No. 91-126-CFX
Status: GRANTED

Title: Howard Wyatt, Petitioner
v.
Bill Cole and John Robbins, II

Docketed:
July 16, 1991

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Waide,Jim

Counsel for respondent: Cole,Bill, Roach,John, Baker,Mark C.

NOTE: Ck rec'd 072291

Entry	Date	Note	Proceedings and Orders
1	Jul 16 1991	G	Petition for writ of certiorari filed.
3	Aug 5 1991		Order extending time to file response to petition until August 31, 1991.
4	Aug 26 1991		Brief of respondent Bill Cole and John Robbins in opposition filed.
5	Aug 28 1991		DISTRIBUTED. September 30, 1991
6	Oct 7 1991		Petition GRANTED.
			**********
9	Nov 12 1991		Record filed.
		*	Original record 7 Volumes, United States District Court,Southern District of Mississippi (1 BOX)
7	Nov 13 1991		Record filed.
		*	Original record proceedings, United States Court of Appeal for the Fifth Circuit. (1 Volume)
10	Nov 13 1991		Record filed.
		*	Certified proceedings and briefs United States Court of Appeals for the Fifth Circuit. 1 Volume
8	Nov 20 1991		SET FOR ARGUMENT TUESDAY, JANUARY 14, 1992. (3RD CASE)
11	Nov 21 1991		Joint appendix filed.
12	Nov 21 1991		Brief of petitioner Howard Wyatt filed.
13	Nov 27 1991		CIRCULATED.
14	Dec 26 1991	X	Brief of respondent Bill Cole filed.
15	Jan 6 1992	X	Reply brief of petitioner Howard Wyatt filed.
16	Jan 14 1992		ARGUED.

EDITOR'S NOTE:

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91-126

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOWARD WYATT,

Petitioner

VERSUS

BILL COLE and JOHN ROBBINS, II

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials.

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IN THE

SUPREME COURT OF THE UNITED STATES

HOWARD WYATT,

Petitioner,

VERSUS

BILL COLE and JOHN ROBBINS, II,

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at _____F. 2d _____(5th Cir. 1991). It is attached as an Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 17, 1991. This Court has jurisdiction to review by a Writ of Certiorari under 28 USC Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment Fourteen, which says:

> "...[N]or shall any state deprive any person of life, liberty or property without due process of law."

FEDERAL STATUTE INVOLVED

The federal statute involved is 42 USC Section 1983, which says:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of an;y rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

STATEMENT OF THE CASE

Respondent, Bill Cole, hired Respondent, Attorney John Robbins, II to obtain an ex parte court order for

the seizure of cattle and other personal property from Cole's business partner, Petitioner Howard Wyatt. Attorney Robbins utilized the Mississippi Replevin Statute (Miss. Code Ann., Section 11-37-101) to accomplish the hearingless seizure. After obtaining an ex parte court order, as allowed by the Mississippi Replevin Statute, Cole, Robbins and various law enforcement officials appeared on the property of Petitioner Wyatt and forcibly took possession of 23 head of cattle and other property which was owned by Wyatt and Cole under a partnership agreement. R., 1234-1236. The hearingless seizure of Wyatt's property by force caused him to suffer severe psychological trauma, and he was subsequently treated by a psychiatrist. R., 1234-1236.

Following a post-deprivation hearing, a state judge ordered the Respondent Cole to return the property or its value to Petitioner, but Cole ignored the order. R., 1234-1236.

Petitioner Wyatt filed suit in the United States District Court for the Southern District of Mississippi,

various governmental officials who had carried out the hearingless seizure. The District Court declared the replevin statute (Miss. Code Ann., Section 11-37-101) under which Petitioner's property was seized unconstitutional. *Wyatt v. Cole*, 710 F. Supp. 180. However, the District Court held Plaintiff was not entitled to damages from either the official who carried out the seizure or from the private Defendants Cole and Robbins. According to the District Court, both the officials and the private parties had qualified immunity. Supp. R., 3-7; R., 1647. In sustaining the Defendants' claim of a good faith immunity from damages, District Judge Barbour held:

> "The replevin statute was enacted following the invalidation of an earlier statute, and until the latter statute was pronounced to be unconstitutional, the individual Defendants had a right to rely upon it."

R., 1647.[1]

[1]District Judge Barbour and the United States Court of Appeals for the Fifth Circuit also absolved the Defendant officials on grounds of good faith immunity. Petitioner is not here challenging that holding, nor is he challenging the holding of the District Court or the Court of Appeals that no governmental entity is liable under the facts of this case.

Petitioner Wyatt appealed the District Court's grant of good faith immunity to the individual Defendants to the United States Court of appeals for the Fifth Circuit. Citing its own precedents, but nothing contrary rulings from other Courts of Appeals, the Fifth Circuit upheld the private Defendants' good faith defense. The Fifth Circuit quoted its earlier decision in *Folsom Inv. Co. v. Moore*, 681 F. 2d 1032, 1037 (5th Cir. 1982):

> "...[T]he...private party is entitled to an immunity because of the important public interest in permitting ordinary citizens to rely on presumptively valid state laws, in shielding citizens from monetary damages when they reasonably resort to a legal process later held to be unconstitutional and in protecting a private citizen from liability when his role in any constitutional action is marginal."

ARGUMENT:

THIS COURT SHOULD GRANT THE WRIT SINCE THE FIFTH CIRCUIT DECISION IS CONTRARY TO BETTER REASONED DECISIONS FROM OTHER CIRCUITS AND SINCE THE COURTS ARE WITHOUT AUTHORITY TO CREATE EXCEPTIONS TO 42 USC SECTION 1983 WHICH ARE CONTAINED NEITHER

IN THE STATUTE NOR IN THE COMMON LAW.

The Fifth Circuit aptly observed that the issue of whether private parties should have qualified immunity under 42 USC Section 1983 has divided the Courts of Appeals. Specifically, footnote 4 of the Fifth Circuit Opinion reads:

> "The Eighth, Tenth and Eleventh Circuits have also granted qualified immunity to private individuals. See *Buller v. Buechler*, 706 F. 2d 844 (8th Cir. 1983); *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F. 2d 714 (10th Cir. 1988); and *Jones v. Preuit & Maudlin*, 808 F. 2d 1435 (11th Cir. 1987). The First Circuit reached a contrary result in *Downs v. Sawtelle*, 574 F. 2d 1 (1st Cir. 1978). The Sixth Circuit rejected qualified immunity for private individuals but recognized a good faith defense in *Duncan v. Peck*, 844 F. 2d 1261 (6th Cir. 1988). The Ninth Circuit initially stated that 'there is no good faith immunity under Section 1983 for private parties', but in a later opinion, appeared to retreat from that position. compare *Howerton v. Gabica*, 70p8 F. 2d 380 (9th Cir. 1983) with *Thorne v. City of El Segundo*, 802 F. 2d 1131, 1140, n. 8 (9th Cir. 1986). The Supreme Court expressly left the issue open in *Lugar v. Edmondson Oil Co.*, 457 U. S. 922,

942, n. 23, 102 S. Ct. 2744, 2756, n. 23, 73 L. Ed. 2d 482 (1982). See generally, Note, *Private Party Immunities to Section 1983 Suits*, 57 U. Chi. L. Rev. 1323 (concluding that good faith immunity should be available to private defendants.)"[2]

The Fifth Circuit thus adopted a view of good faith immunity which is inconsistent with precedents of this Court. *Dennis v. Sparks*, 449 U. S. 24, 101 S. Ct. 183-186, 66 L. Ed. 2d 185 (1980), held that a private party, conspiring with a judge, was not entitled to a judge's immunity. This result was based on the fact that the rationale for granting immunity to a judge would have no application to the private judge. A judge's immunity is based on a necessity that he exercise unfettered discretion in making judicial decisions. If a judge be held liable in damages, he will be deterred from exercising a proper judicial judgment for fear of a lawsuit. The rationale for a judge's immunity has no application to a private party, who agreed with the judge to commit an unconstitutional act. Accordingly, *Dennis* held that a private party who agreed with a judge to commit an unconstitutional act does not have the judge's immunity.

[2]The Fifth Circuit characterizes the Ninth Circuit as retreating from the position that qualified immunity is unavailable to a private Defendant. Actually, the recent decisions from the Ninth Circuit adhere to the position that qualified immunity is unavailable to private Defendants. *Conner v. Santa Ana*, 897 F. 2d 1487 (9th Cir. 1990); *F. E. Trotter v. Watkins*, 869 F. 2d 1312 (9th Cir. 1989).

The same rationale is applicable to a good faith defense. Like judicial immunity, the qualified immunity available to public officials is based upon a necessity of granting these officials a broad discretion in carrying out governmental functions. The rationale for qualified immunity is to permit officials to be unafraid to carry out their governmental activities for fear of lawsuits. As explained in *Harlow v. Fitzgerald*, 457 U. S. 800, 814, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982):

> These social costs (of permitting officials to be sued) include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrents available to citizens from acceptance of public office. Finally, there is a danger that fear of being sued will dampen the ardor of all but the most resolute or the most irresponsible public officials in the unflinching discharge of their duties."

This rationale does not apply to private Defendants. Private Defendants are not concerned with saving energy for "pressing public issues", are not involved in the rationale of "deterring citizens from acceptance of public office", and have no need to be protected from an "unflinching discharge of their duties".

To deny damages to one injured by a private party is to deny "the only realistic avenue for vindication of constitutional rights", while not serving the purposes of the grant of qualified immunity. Granting immunity to these private Defendants imposes a social cost of denying a remedy for constitutional wrong while not obtaining the benefits traditionally associated with the grant of qualified immunity. This is contrary to *Harlow v. Fitzgerald*, 457 U. S. 800 at 814 (1982):

> "An action for damages may offer the only realistic avenue for vindication of constitutional rights."

The Fifth Circuit justified its grant of immunity to private citizens on the theory that such a grant of immunity would serve the purpose of "promoting lawfulness by allowing citizens the reasonable sanctuary of the law." Such reasoning sacrifices the interests of the innocent in favor of the guilty. The Fifth Circuit decided that a citizen, who was the victim of unconstitutional and lawless action, is to have no remedy merely because a private party was ignorant of the requirements of the United States Constitution. As between one who is entirely innocent of any wrongdoing (Petitioner Wyatt) and private citizens who act in ignorance of the Constitution, the better policy is to reward the innocent, not those ignorant of the requirements of the United States Constitution. It is not the fault of the Petitioner Wyatt that a practicing attorney does not recognize the unconstitutionality of a statute. It is illogical to reward an attorney; ignorant of the Bill of Rights at the expense of an entirely innocent victim.

Finally, the Fifth Circuit's granting immunity to private parties is inconsistent with the fact that immunities under 42 USC Section 1983 are the result of an incorporation of common law immunity doctrines.

See, for example, *Owen v. City of Independence*, 445 U. S. 622, 638 (1980) and *Imbler v. Pachtman*, 424 U. S. 409, 421 (1976) (Whether to grant immunity requires "inquiring into the immunity historically afforded the relevant official at common law".) Common law immunity doctrines protect officials. By definition, they have no application to private parties. To grant an immunity contained neither on the face of the statute, nor supportable by any common law history, is to invade the law-making prerogative which the United States Constitution reserves for the Congress. See *Will v. Michigan Dept. of State Police*, ____U. S. ____, 109 S. Ct. 2304, 2309 (1989) (In determining immunity question, this Court inquired whether Congress intended to respect or to override immunities granted under the common law.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jim Waide, one of the attorneys for Petitioner, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

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THIS the 12th day of July, 1991

Jim Waide

JIM WAIDE

APPENDIX "A"

WYATT v. COLE

Howard L. WYATT,
Plaintiff-Appellant-Cross-Appellee,

v.

Bill COLE, et. al., Defendants-Appellees,

and

Lloyd S. Jones, Wiley Magee & Mike Moore
Defendants - Appellees-Cross-Appellants.

No. 90-1058.

United States Court of appeals, Fifth Circuit.

April 17, 1991.

Party against whom action was brought under Mississippi replevin statute brought civil rights action seeking declaration that statute was unconstitutional. The United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., Chief Judge, 710 F. Supp. 180, declared statute unconstitutional and awarded damages and attorney fees. Appeal was taken. The Court of Appeals held that: (1) party who had filed replevin complaint against present civil rights

plaintiff, and that party's attorney, were entitled to good faith immunity from damages accrued before Mississippi replevin statute was declared unconstitutional; (2) such party and attorney enjoyed good faith immunity from liability for attorney fees; and (3) District Court's award of attorney fees was not clearly erroneous.

Affirmed in part, and reversed and remanded in part.

1. Civil Rights ¦211, 213

Private party who filed complaint in replevin against former business partner and private party's attorney were entitled to good faith immunity in former business partner's civil rights action from damages accrued before Mississippi replevin statute was declared unconstitutional, even though the Fifth Circuit had previously declared unconstitutional a similar statute in another state; private party and attorney acted with assistance of government officials who were giving full force and effect to statutory procedure and presence of those officials contributed to reasonableness of private actors'

conformity to statutory procedure. 42 U.S.C.A. § 1983; Miss. Code 1972, § 11-37-101.

2. Civil Rights ¦412

Good faith immunity that insulated private defendants in civil rights action from monetary damages for damages accrued before Mississippi replevin statue, pursuant to which they had acted, was declared unconstitutional also foreclosed liability for attorney fees. 42 U.S.C.A. §§ 1983, 1988; Miss Code 1972 § 11-37-101.

3. Civil Rights ¦214(2)

Good faith immunity is not available as a defense in official-capacity civil rights actions. 42 U.S.C.A. § 1983.

4. States ¦191 (1)

State is entitled only to its immunity under Eleventh Amendment and as a sovereign, and not to good faith immunity. U.S.C.A. Const. Amend. 11.

5. Civil Rights ¦297

Attorney fee awards against officials in their individual capacities are appropriate in civil rights action only when officials acted in bad faith. 42 U.S.C.A. §

1983.

6. Civil Rights ¦294

Attorney General, sheriff, deputy sheriff, and county clerk who were sued in their official capacities in civil rights action did not enjoy good faith immunity from liability for attorney fees. 42 U.S.C.A. §§ 1983, 1988.

7. Civil Rights ¦294

State was not immune from liability for attorney; fees in civil rights actin even though state was immune from damages under § 1983. 42 U.S.C.A. §§ 1983, 1988.

8. Civil Rights ¦294

County officials acted as state agents in enforcing Mississippi replevin statute, which was declared unconstitutional and consequently, state was liable in civil rights action for attorney fees incurred by person against whom statute was enforced. 42 U.S.C.A. § 1983; Miss. Code 1972, § 11-37-101.

9. Civil Rights ¦296

Civil rights plaintiff was a "prevailing party" entitled

to recover attorney fees; as a result of action district court declared Mississippi replevin statute unconstitutional and that judgment affected behavior of person who proceeded under replevin statute against civil rights plaintiff by effectively requiring him to return property seized. 42 U.S.C.A. §§ 1983, 1988; Miss. Code 1972, § 11-37-101.

10. Civil Rights ¦296

Declaratory judgment supports attorney; fee award under § 1988 if, and only if, it affects behavior of defendant towards plaintiff. 42 U.S.C.A. §§ 1983, 1988.

11. Civil Rights ¦296, 301, 303

District court's decision to refuse to award attorney fees against state for work done after date of declaratory judgment holding Mississippi replevin statute unconstitutional and reducing, as excessive and duplicative, hours for time before declaratory judgment by 30% and by another 50% to account for limited success was not clearly erroneous. 42 U.S.C.A. §§ 1983, 1988; Miss. Code 1972, § 11-37-101.

12. Civil Rights ¦301, 302

When civil rights claims are based on different facts and legal theories, district court should treat claims as separate suits and award attorney fees only for time expended on successful claims; on the other hand, when claims arise from [illegible] involve related legal theories, district court should attempt to arrive at reasonable fee award either by attempting to identify specific hours that should be eliminated or by simply reducing award to account for limited success of plaintiff. 42 U.S.C.A. §§ 1983, 1988.

Appeals from the United States District Court for the Southern District of Mississippi.

Before JOHNSON, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Howard L. Wyatt appeals a summary judgment order denying his claim for monetary damages under 42 U.S.C. § 1983 and awarding less than his requested

attorneys fees under 42 U.S.C. § 1988. We find that monetary damages are barred by the defendants' immunities and that the fee award against the state was not clearly erroneous, but remand to the district court for the calculation of a reasonable fee award against defendant Bill Cole.

I.

Howard L. Wyatt and Bill Cole are former business partners. On July 25, 1986, with the assistance of his attorney, John Robbins II, Cole filed a complaint in replevin against Wyatt to the Circuit Court of Simpson County, Mississippi, accompanied with a replevin bond of $18,000. Cindy Jensen, a deputy of Count;y Clerk Wiley Magee, then issued a writ of replevin. Circuit Judge Jerry Yewager signed an order directing the count;y sheriff to execute the writ of replevin several days later. Sheriff Jones, Deputy Sheriff Smith, wrangler Ray Roberts, and several others subsequently seized 24 head of cattle, a tractor, and parts on July 29 and 30, 1986. The writ and summons were served on

Wyatt on July 31, 1986. Several months later, on October 3, 1986, Judge Yeager entered an order dismissing the writ, continuing the replevin bond in force, and ordering the immediate restoration of Wyatt's property. Judge Yeager dismissed the action without prejudice on September 3, 1988, although Cole had not yet complied with the October 3, 1986, order. Mississippi's replevin under bond statute, Miss. Code Ann. § 11-37-101,[1] prescribed this procedure.

Wyatt filed this suit under 42 U.S.C. § 1983, 28 U.S.C. § 2201, and several state statutes, in July, of

1. At the time of the relevant events in this case, the Mississippi replevin statute provided as follows:
If any person, his agent or attorney, shall file a declaration under oath setting forth: (a) A description of any personal property; (b) The value, thereof, giving the value of each separate article and the value of the total of all articles; (c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim; (d) That the property is in the possession of the defendant; and (e) That the defendant wrongfully took and detains or wrongfully detains the same; and shall present such pleadings to a judge of the supreme court, a judge of the circuit court, a chancellor, a county judge, a justice of the peace or other duly elected judge, *such judge shall issue an order directing the clerk of such court to issue a writ of replevin* for the seizure of the property described in said declaration, upon the plaintiff posting a food and valid replevin bond in favor of the defendant for double the value of the property as alleged in the declaration, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff...
Miss. Code Ann. § 11-37-101 (West 1988 Supp.) (emphasis added)

1987. When Mississippi filed as an amicus curiae, Wyatt added the state as a defendant, later substituting Attorney General Moore in his official capacity for the state.

The district court declared § 11-37-101 unconstitutional on April 13, 1989, 710 F. Supp. 180, and ordered Wyatt to detail the claims against each defendant by moving for summary judgment. Wyatt did so, requesting damages and attorneys fees from Cole and Robbins, Jones, Smith, Magee, and Jensen, in their official capacities, and Simpson County, alternatively from Moore in his official capacity. The district court granted summary judgment against Cole for an y damages accruing after April 14, 1989, denied summary judgment against Robbins, and dismissed the claims against Simpson County, Jones, Smith, Magee, Jensen, and Roberts.

After a jury found no actual damages, Wyatt moved for nominal damages and attorneys fees against Cole, Robbins, and Simpson County, and for attorneys fees

against Moore in his official capacity. The district court found Mississippi liable for fifty percent of the fees earned for work before it declared § 11-37-101 unconstitutional, but found the remaining defendants were not liable for any damages or fees.

Defendants do not appeal the declaratory judgment.[2] Wyatt seeks monetary damages from the private defendants, Cole and Robbins, and attorneys fees from both the private defendants and the state of Mississippi.

He waived his claims against the county defendants individually below and, at oral argument before this court, conceded that those defendants are not liable in their capacities as county officials.[3]

[2]. The district court concluded that § 11-37-101 was unconstitutional because it provided "no discretion to the judge to deny a writ of replevin on presentation of a complaint in the statutory form." This result was mandated by *Johnson v. American Credit Co. of Georgia*, 581 F. 2d 526 (5th Cir. 1978), a case involving a Georgia prejudgment attachment statute, and four Supreme Court cases, *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed.2d 751 (1975); *Mitchell v. W.T.Grant Co*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *Fuentes v. Shevin*, 407 U. S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969). Mississippi has since amended its replevin statute to conform to *Johnson*. *See* Miss. Code Ann. § 11-37-101 (West 1990 Supp.).

[3]. *See Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990); and *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988).

II.

(1) Based on our opinion in *Folsom Inv. Co. v. Moore*, 681 F.2d 1032, 1037 (5th Cir. 1982), the district court found that Cole and Robbins were entitled to a good faith immunity from damages accrued before it declared § 11-37-101 unconstitutional. In *Folsom*, we held that "a § 1983 defendant who has invoked an attachment statute is entitled to an immunity from monetary liability so long as he neither knew nor reasonably should have known that the statute was unconstitutional."[4]

Wyatt contends that *Folsom* is inconsistent with

4. The Eighth, Tenth, and Eleventh Circuits have also granted qualified immunity to private individuals. *See Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983); *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988); and *Jones v. Preuit & Maudlin*, 808 F.2d 1435 (11th Cir. 1987). The First Circuit reached a contrary result in *Downs v. Sawtelle*, 574 F2d 1 (1st Cir. 1978). The Sixth Circuit rejected qualified immunity for private individuals but recognized a good faith defense in *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988). The Ninth Circuit initially stated that "there is no good faith immunity under section 1983 for private parties," but in a later opinion, appeared to retreat from that position. *Compare Howerton v. Gabica*, 708 F.2d 380 (9th Cir.1983); *with Thorne v. City of El Segundo*, 802 F. 2d 1131, 1140 n. 8 (9th Cir. 1986). The Supreme Court expressly left the issue open in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n. 23, 102 S. Ct. 2744, 2756 n. 23, 73 L.Ed. 2d 482 (1982). *See generally* Note, *Private Party Immunities to Section 1983 Sits*, 57 U.Chi.L. Rev. 1323 (concluding that good faith immunity should be available to private defendants).

Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), where the Supreme Court held that private defendants accused of conspiring with a judge were not entitled to a derivative immunity. In *Folsom*, however, we stated quite clearly that the immunity of private defendants is not derivative, but rather is independent and functional.

> The private party who invokes a presumptively valid attachment law is not entitled to immunity because the officer executing it is. Rather, quite independently, the private party is entitled to an immunity because of the important public interest in permitting ordinary citizens to rely on presumptively valid state laws, in shielding citizens from monetary damages when the;y reasonably resort to a legal prices later held to be unconstitutional, and in protecting a private citizen from liability when his role in any unconstitutional action is marginal.

Wyatt also argues that, even if Cole and Robbins were entitled to a good faith immunity under *Folsom*, their actions here were not in good faith. He points out that § 11-37-101 was clearly unconstitutional after *Johnson v. American Credit Co. of Georgia*, 581 F.2d.

526 (5th Cir. 1978), where we struck down a similar Georgia prejudgment statute. This contention gives us some pause, but it is not so clear as Wyatt would have it. Indeed, as late as *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 2756, 73 L. Ed.2d 482 (1982), the role of a private actor invoking state attachment procedure was legally uncertain. *Folsom*, in turn, left the precise contours of the immunity to future cases. Specifically, *Folsom* was unwilling to conclude that "a private citizen should be charged with the same degree of knowledge as to whether a statute or practice is unconstitutional that would be attributed to a public official." *Id.* at 1037. Today, we squarely face that issue.

We need not conclude that a private actor is entitled to rely on any statutory relic, regardless of its current absurdity, in order to conclude that Cole and Robbins, as non-governmental actors, were entitled to rely on § 11-37-101 until the district court declared it unconstitutional. Rather, we say only that liability on these facts would undercut the purpose of the immunity,

promoting lawfulness by allowing citizens the reasonable sanctuary of the law. It is true that the statutory scheme was in legal jeopardy. It is also true that Cole and Robbins acted with the assistance of government officials who were giving full force and effect to the statutory procedure. The presence of these officials contributed to the reasonableness of the private actors' conformity to the statutory procedure. In sum, the question is close, but on balance we are persuaded that reliance upon the statute by the private actors was not an act of unreasonable ignorance. The first line of responsibility rests with the legislative body enacting the statute. The next line of responsibility rests with the enforcing officials. When the legislature has not repealed, and executive and judicial officials are still enforcing a statute, it is not unreasonable for private actors to fail to quickly comprehend a developing body of doctrine that portends trouble for its constitutionality.[5]

[5]. Although Robbins is an attorney, he is subject to the same standard of good faith as Cole because the relevant distinction is between persons acting privately and those acting for the state.

III.

The district court concluded that Wyatt had prevailed on the central issue in the case, the constitutionality of § 11-37-101, and awarded Wyatt's attorneys $16,588.15 in fees under § 1988, to be paid by the state of Mississippi. Wyatt had requested a much larger fee award, but the district court limited the award to compensate Wyatt's attorneys only for their success on the constitutional issue.

A. Qualified immunity, sovereign immunity, and § 1988.

[2] Wyatt argues that Cole and Robbins should be held jointly liable for his attorneys fees. But the same good faith immunity that insulates the private defendants from monetary damages also forecloses liability for attorneys fees. *Familias Unidas v. Briscoe*, 619 F.2d 391, 406 (5th Cir. 1980); *see also Clanton v. Orleans Parish School Bd.*, 649 F.2d 1084, 1103 (5th Cir. 1981); *and Universal Amusement Co., Inc. v. Vance* 559 F. 2d 1286, 1301 (5th Cir. 1977), *aff'd on other grounds*, 445 U.S. 308, 100 S. Ct. 1156, 63 L.Ed. 2d 413 (1980);

accord Stevens v. Gay, 792 F.2d 1000, 1003 (11th Cir. 1986). "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3104, 87 L.Ed. 2d 114 (1985). Cole and Robbins are thus immune from liability for attorneys fees for all acts taken before the district court declared § 11-37-101 unconstitutional.

[3-7] Mississippi stands on different footing. Attorney General Moore, Sheriff Jones, Deputy Sheriff Smith, and clerk Magee were sued in their official capacities; good faith immunity is not available as a defense in official-capacity actions. The state is entitled only to its immunity under the Eleventh Amendment and as a sovereign. *Graham*, 473 U.S. at 167, 105 S. Ct. at 3105. As the Supreme Court explained in *Hutto v. Finney*, 437 U.S. 678, 693, 98 S.Ct. 2565, 2574, 57 L.Ed.2d 522 (1978), Congress has plenary power to abrogate the

immunity of the states under the Eleventh Amendment. Congress intended to authorize awards of attorneys fees under § 1988 to prevailing parties in official-capacity actions even when the state is immune from damages under § 1983. *Id.; see also Pulliam v. Allen*, 466 U.S. 522, 527, 104 S.Ct. 1970, 1973, 80 L.Ed.2d 565 (1984).[6]

B. *Judge Yeager, Sheriff Jones, and Clerk Magee as state agents*

[8] In a cross-appeal, Mississippi argues that Attorney General Moore was an improper party to the suit, as he did not contribute to the found constitutional violation. We need not reach this issue because the state's argument overlooks the fact that Yeager, Jones, Smith, Magee and Jensen contributed to the violation by enforcing § 11-37-101. As we explained in *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990):

> A county official pursues his duties as a state agent when he is enforcing state law or policy.

[6]. In contrast, fee awards against officials in their individual capacities are only appropriate when they acted in bad faith. *Finney*, 437 U.S. at 700, 98 S.Ct. at 2578.

> He acts as a county agent when he is enforcing county law or policy. It may be possible for the officer to wear both state and county hats at the same time,...but when a state statute directs the action of an official, as here, the officer, be he state or local, is acting as a state official.

See also Bigford v. Taylor, 834 F.2d 1213, 1222-23 (5th Cir. 1988); and *Familias Unidas v. Briscoe*, 619 F. 2d 391, 404 (5th Cir. 1980).[7] As in *Echols*, *Bigford*, and *Familias*, § 11-37-101 commanded the actions of the county defendants; in fact, it was the statute's limit of Judge Yeager's discretion that [illegible] nation that § 11-37-101 was unconstitutional. Yeager, Jones, Smith, Magee, and Jensen acted as state agents, and Mississippi is liable.[8]

The state also contends that it is not liable for attor-

[7] *Echols* expressly distinguished the case relied on by the state, *Nash v. Chandler*, 848 F.2d 567 (5th Cir. 1988).

[8] In a letter to this court after oral argument, attorneys for the county contended that Wyatt cannot rely on *Echols* to hold the county officials liable for attorneys fees in their capacity as state agents because he expressly abandoned his claims against them in his brief to this court. We think that the reference in the brief is ambiguous at best, and we interpret it as an abandonment of his claims against the county officials only in their *individual* capacities and not in their official capacities as *state* agents.

ing *Graham* and *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)). The problem with the argument is that Mississippi overstates *Will* "because 'official capacity actions are not treated as actions against the state.'" *Will* 109 S.Ct. at 2311 n. 10 (citing *Graham*, 473 U.S. at 167 n. 14, 105 S. Ct. at 3106 n. 14). *Graham* and *Will* were thus no bar to the award of attorneys fees against the state.[9]

C. Wyatt's status as a prevailing party.

[9] We turn to whether Wyatt was a prevailing party. It is true that the district court declared § 11-37-101 unconstitutional, but it also denied Wyatt's damage claims. The judge below never ruled on the request for an injunction.

[10] A declaratory judgment supports a fee award under § 1988 "if, and only if, it affects the behavior

[9] In a separate cross-appeal, Simpson County asks that we modify the district court judgment to reflect that all attorneys fees are owned by the state, and none by the county. We believe that no modification is necessary, as both the district court's order and the accompanying memorandum opinion make it quite clear that all fees are owed by the state.

of the defendant towards the plaintiff." *Rhodes v. Stewart*, 488 U.S. 1, 109 S. Ct. 202, 203, 102 L.Ed.2d 1 (1988); *see also Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987). In *Rhodes*, the Court reversed an award of attorneys fees in an action challenging prison conditions because one of the plaintiffs had died at the time that the declaratory judgment was entered, and the other was no longer in custody. The Court reasoned that the declaratory judgment "afforded the plaintiffs no relief whatsoever," as the case became moot before the judgment was entered. This court relied on *Rhodes* in partially reversing an award of attorneys fees in *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989), reasoning that the declaratory judgment did not compel the defendant, a county court clerk, to change his procedures.

The declaratory judgment in this case affected the behavior of Cole towards Wyatt by effectively requiring him to return the property seized. He is liable for attorneys fees accrued after the date of the declaratory

judgment because he continued to hold Wyatt's property for several months thereafter.[10] Robbins, on the other hand, is not liable for attorneys fees because he performed no acts subsequent to the declaratory judgment that contributed to the constitutional violation. In contrast to *Rhodes* and *Jackson*, Wyatt also achieved a legal victory over the state. The county officials, as state actors, vigorously defended their actions under § 11-37-101 until the district court declared it unconstitutional. Wyatt succeeded in his claim that the statute was invalid and not to be adhered to. He was a prevailing party.

D. *The size of the fee.*

[11] Finally, Wyatt contends that the district court erred in calculating the fee award against Mississippi. The district court refused to award fees for work done after the date of the declaratory judgment and reduced, as excessive and duplicative, hours for time before the declaratory judgment by thirty percent, and by another fifty percent to account for limited success. We review

[10] We express no opinion on the size of a reasonable free against Cole.

the size of the fee award only for abuse of discretion. *See City of Riverside v. Rivera*, 477 U.S. 561, 572-73, 106 S.Ct. 2686, 2693-94, 91 L.Ed.2d 466 (1986); and *Nash v. Chandler*, 848 F.2d 567, 572 (5th Cir. 1988).

The fee award was consistent with the Supreme Court's directives in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and *Texas State Teachers v. Garland Indep. School D.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). A district court may; reduce the hours claimed to account for time expended on unsuccessful claims. This follows from defining a "prevailing party" as one who has "succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Texas State Teachers*, 109 S.Ct. at 1486 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

[12] The Court distinguished between two situations in an effort to guide the discretion of lower courts in *Hensley* and *Texas State Teachers*. When claims are

based on different facts and legal theories, the district court should treat the claims as separate suits and award attorneys fees only for time expended on the successful claims. On the other hand, when the claims arise from a common core of facts and involve related legal theories, the district court should attempt to arrive at a reasonable fee award "either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff." *See Hensley*, 461 U.S. at 434-36,103 S.Ct. at 1939-41; *Texas State Teachers*, 109 S.Ct. at 1492.

Wyatt's request for attorneys fees was of the second type. The district court chose an appropriate fee award both identifying the time expended by his attorneys after the declaratory judgment and, in addition, by reducing the hours claimed before the declaratory judgment to account for his limited success.

Wyatt argues that the reduced fee award is inconsistent with *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct.. 2686, 91 L.Ed.2d 466 (1986), and *Nash v. Chandler*, 848 F.2d 567 (5th Cir. 1988), but we find both cases distinguishable. In *Riverside*, the Court held only that a fee award need not be proportional to the amount of monetary damages recovered. There is a huge difference, however, between an unsuccessful claim and a small monetary recovery on a successful claim. In *Nash*, 848 F.2d at 572-73, we affirmed a fee award that included compensation for hours logged in pursuing unsuccessful claims that the district court believed were "highly relevant to [the plaintiff's] successful challenge to the statute" and "not so distinct from the successful claims so as to be severed for purposes of awarding attorneys fees." Here, the hours expended after the date of the declaratory judgment were severable. As to work prior to the declaratory judgment, we cannot say that the district court's decision to reduce the hours claimed by fifty percent was clearly erroneous, especially so with no detailed records.

The judgment of the district court is AFFIRMED in

part and, in part, REVERSED and REMANDED. We return the case to the district court for the calculation of a reasonable fee award against Cole.

No. 91-126

In The

Supreme Court of the United States

October Term, 1991

HOWARD WYATT,

Petitioner,

versus

BILL COLE and JOHN ROBBINS, II

Respondents.

Petition For
Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Respondents Robbins and Cole would refer the Court to *Wyatt v. Cole, et al,* No. 90-1058 (5th Cir. Apr. 17, 1991), attached as Appendix "A" to Petition for Certiorari, for a detailed description of the facts of the case as found by the United States Court of Appeals for the Fifth Circuit.

ARGUMENT IN OPPOSITION TO GRANTING OF WRIT

THIS COURT SHOULD NOT GRANT THE WRIT SINCE THE FIFTH CIRCUIT'S DECISION IS BETTER REASONED THAN CONTRARY DECISIONS FROM OTHER CIRCUITS.

At the onset it should be pointed out that the Petitioner has not appealed the lower courts' findings that

the Defendant officials correctly asserted good faith immunity under the facts in the case nor that no governmental entity is liable under the facts in the case. *Petition For Writ of Certiorari*, at 4, n. 1.

Consistent with precepts of recognized immunity doctrines it cannot be denied that if public officials using a presumptively valid statute are determined to be qualifiedly immune, then private individuals, considered to be acting under color of state law and using a presumptively valid statute are equally entitled to assert such an immunity. It is the Petitioner's contention that immunity for private individuals is not recognized within the interpretation of 42 U.S.C. § 1983 or the common law; however, several federal courts, as well as the Supreme Court of Mississippi, have correctly acknowledged the existence of an immunity for private individuals acting under color of state law.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court determined that private actors who invoke a presumptively valid statue were "state actors" under 42 U.S.C. § 1983. Although this Court reserved the question of whether such defendants are entitled to qualified immunity, it appears that the question was viewed in terms of a choice between providing such defendants with a good faith defense or incorporating an element of bad faith in a plaintiff's claims. The language of the opinion seems to express a preference in favor of establishing good faith immunity as a defense for private actors. *Id.* at 942 n.23. As recognized in *Wyatt, supra,* in addition to the Fifth Circuit, the Eighth, Tenth and Eleventh Circuits have granted qualified immunity to private individuals. *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983);

DeVargas v. Mason and Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988); and *Jones v. Preuit & Mauldin*, 808 F.2d 1435 (11th Cir. 1987) (All post-*Lugar* opinions).

In *Underwood v. Foremost Financial Services*, 563 So.2d 1387 (Miss. 1990), the Supreme Court of Mississippi in examining the application of qualified good faith immunity to private defendants acting under color of state law, did not even imply that those defendants who are sued under color of state law for an alleged deprivation of constitutional rights were not entitled to assert qualified immunity but rather addressed only whether the facts indicated that the private defendants acted within the immunity provided. Clearly the court in *Underwood* acted as if the existence of good faith immunity for public defendants sued under Section 1983 was equally applicable to private defendants.

As stated in *Folsom Inv. Co., Inc. v. Moore*, 681 F. 2d 1032, 1035 (5th Cir. 1982):

> When a citizen undertakes in good faith to utilize a proceeding at law provided by his state legislature, he should do so with confidence that he need not fear liability resulting from the legislature's constitutional error of which he was unaware. Indeed, our system encourages citizens to employ existing lawful mechanisms to resolve their claims and disputes. What we encourage we ought not seek to punish. In the same way we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert their claimed rights through the employment of legal mechanisms which they believe, in good faith are constitutional.

Robbins and Cole submit that the decisions of the District Court, the United States Court of Appeals for the Fifth Circuit and the Supreme Court of Mississippi acknowledging the existence of a good faith qualified immunity for private defendants, alleged to be acting under color of state law and using a presumptively valid statute, are consistent with the better reasoned opinions of the Eighth, Tenth and Eleventh Circuits.

The Petitioner would have this Court find that private defendants held to the standard of public officials and acting with public officials are not entitled to assert the same defenses and immunities as those public officials. Due process, equal protection and equity necessarily require a contrary result.

CONCLUSION

For these reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 91-126

In The
Supreme Court of the United States
October Term, 1991

HOWARD WYATT,
Petitioner,

vs.

BILL COLE AND JOHN ROBBINS, II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petition for Certiorari filed July 16, 1991
Certiorari granted October 7, 1991

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The following opinion has been omitted in printing the Joint Appendix because it appears on the following pages of the Appendix to the Petition for Certiorari:

Opinion of Fifth Circuit Court of Appeals, pp. 13-37.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

A. UNITED STATES DISTRICT COURT:

June 24, 1987	Complaint
September 26, 1988	Plaintiff's Motion for Partial Summary Judgment.
October 3, 1988	Plaintiff's Second Amended Complaint.
April 13, 1989	Memorandum Opinion and Order: that partial summary judgment is granted.
Aug. 10, 1989	Memorandum Opinion and Order: It is Ordered that Pltf's motion for summary judgment is granted insofar as Bill Cole shall be liable for any damages which Pltf. can demonstrate in this cause; Further Ordered that Motion for Summary Judgment of Pltf. against Robbins is denied; Further Ordered that the Motion of Simpson County Defendants for summary judgment is granted and Simpson County, Magee, Jensen, Jones and Smith are dismissed; Further Ordered that all claims in this action against Roberts are dismissed; Further Ordered in all other respects, the Final Motion for Summary Judgment of the Pltf. is denied.

Sept. 15, 1989	Hearing or trial before United States District Judge William Barbour, Jr.
Jan. 24, 1990	Plaintiff's Notice of Appeal to the United States Court of Appeals for the Fifth Circuit.

B. UNITED STATES COURT OF APPEALS:

April 17, 1991	United States Court of Appeals for the Fifth Circuit Opinion.

C. UNITED STATES SUPREME COURT:

July 16, 1991	Petition for Writ of Certiorari filed.
Oct. 7, 1991	Certiorari granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOWARD L. WYATT, PLAINTIFF VS. BILL COLE, JOHN ROBBINS, II, J. B. TORRENCE, RANKIN COUNTY, MISSISSIPPI; LLOYD S. JONES; WILEY MAGEE; CINDY JENSON; ERNEST E. SMITH; SIMPSON COUNTY, MISSISSIPPI RAY ROBERTS; AND THE STATE OF MISSISSIPPI, DEFENDANTS	CIVIL ACTION FILE NO. J87-0421(B)

MEMORANDUM OPINION AND ORDER

The Court has before it various motions to dismiss and for summary judgment submitted by the Plaintiff and Defendants. The Court reads the pending motions to dismiss as motions for summary judgment pursuant to Federal Rule of Civil Procedure 12 (b). The defenses and claims presented are each intertwined with the claim of the Plaintiff for a declaration that the replevin with bond statute of the State of Mississippi is unconstitutional. The Court has heard argument on the motions, reviewed the extensive pleadings, memoranda, affidavits and exhibits submitted by the parties, and finds no continuing question of material fact which might preclude partial summary judgment on this central question. As set forth below, this Court finds that the Mississippi replevin under bond statute, Section 11-37-101 of the Mississippi Code,

is contrary to the Constitution of the United States and therefore unenforceable.

I.

Howard Wyatt brings this action under 42 U.S. C. § 1983, 28 U.S.C. § 2201, and pendant state law provisions for abuse of process. His central claim arises from an unjustified replevin by a former partner, Bill Cole. On July 25, 1986, Bill Cole submitted a Complaint in Replevin to the Circuit Court of Simpson County, Mississippi, accompanied by a Plaintiff's Replevin Bond of $18,000. A Writ of Replevin was then issued by Cindy Jensen, a deputy of Wiley Magee, Circuit Clerk of Simpson County. On July 28, Circuit Judge Jerry Yeager signed an Order directing the Circuit Clerk to issue a writ of replevin directed to the Sheriff of Simpson County, Mississippi. That writ was executed on July 29th and 30th by the Sheriff of Simpson County and others, who seized 24 head of cattle, a tractor and parts. The writ and a Summons were served on Wyatt on July 31, 1986. On October 3, 1986, Judge Yeager entered an Order dismissing the writ at the cost of the plaintiff, continuing the replevin bond in force, and ordering Cole to

> immediately restore to the defendant the property taken from defendant pursuant to plaintiff's complaint in replevin and writ of replevin if said property is to be had, or, if said property is not to be had, to pay unto defendant the value thereof and any damages in this cause for the wrongful suing out of the writ of replevin by plaintiff as assessed upon writ of inquiry.

The action in the Circuit Court was dismissed without prejudice on September 3, 1988, although Cole had not complied with the October 3, 1986, Order.

While a question exists as to the initial validity of the writ under the hand of a deputy court clerk without an order from a judge specified in the statute, the writ was not executed until a judge had ordered that such a writ be issued, and any defect in statutory procedure was then cured. It is uncontested that the writ was issued on a complaint as described in the statute, that the complaint was brought before a judge described in the statute, that the judge issued an order directing the issue of a writ, that the writ issued, that it was executed following judicial signal, and that Wyatt was deprived of property as a result.

II.

The Mississippi replevin under bond statute is set forth in Section 11-37-101 of the Mississippi Code. It provides that an action in replevin will be commenced:

> If any person, his agent or attorney, shall file a declaration under oath setting forth:
>
> (a) A description of any personal property;
>
> (b) The value thereof, giving the value of each separate article and the value of the total of all articles;
>
> (c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;
>
> (d) That the property is in the possession of the defendant; and
>
> (e) That the defendant wrongfully took and detains or wrongfully detains the same; and

> shall present such pleadings to a judge of the supreme court, a judge of the circuit court, a chancellor, a county judge, a justice of the peace or other duly elected judge, such judge shall issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said declaration, upon the plaintiff posting a good and valid replevin bond in favor of the defendant, for double the value of the property as alleged in the declaration, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff...

(Emphasis supplied by the Court.) Miss. Code. Ann. § 11-37-101 (1988 Supp.) The judge is given discretion only to determine proper valuation of the property to be seized. See Miss. Code. Ann. § 11-37-103. The writ of replevin commands the sheriff or other lawful officer to immediately seize the property described n the writ and deliver it to the plaintiff and to summon the defendant to appear before the Court. Miss. Code. Ann § 11-37-109. A trial of a replevin action may be had at any time following seizure or summons, so long as five days' process have been had upon the defendant. Miss. Code. Ann. § 11-37-125. If the defendant prevails, the plaintiff and his sureties are to restore any seized property or to pay the value of such property in damages for wrongful suit.

III

The Fourteenth Amendment of the Constitution of the the United States provides, in part, that

> No State shall...deprive any person of life, liberty or property, without due process of law...

U.S. Cons. Amend. 14, § 1. The Due Process Clause has been applied by the Supreme Court of the United States to prevent the taking of property both in replevin and by garnishment without sufficient process. See *Fuentes v. Shevin*, 407 U.S. 67 (1972); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975). In both of these cases the Supreme Court held that statues allowing seizures ordered by a court clerk without a hearing were unconstitutional. These cases did not prevent prejudgment seizures in every instance, and a Louisiana sequestration statute was upheld which allowed a creditor to obtain sequestration on order of a state court judge who was obligated to review the sufficiency of allegations in the petition for the writ prior to its issuance or denial. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). The Fifth Circuit Court of Appeals applied the *Fuentes* standard in *Turner v. Colonial Finance Corp.*, 467 F. 2d 202 (1972), striking down an earlier Mississippi replevin statute directing clerks of court to issue the writ. In *Johnson v. American Credit Company of Georgia*, 581 F. 2d 526 (5th Cir. 1978), the Fifth Circuit made clear that "due process requires that a prejudgment seizure be authorized by a judge who has discretion to deny issuance of the appropriate writ. *Johnson* 581 F. 2d at 534 (Emphasis supplied by this Court.)

The Mississippi replevin under bond statute provides no discretion to the judge to deny a writ of replevin on presentation of a complaint in the statutory form. By the terms of the statute, the judge "shall" grant whatever is presented. The required protections of judicial determination of the validity of the complaint, which are present in Mississippi's Claim and Delivery statutes, are absent. See Miss. Code. Ann. § 11-28-1, et seq. (1988 Supp.). This failing makes consideration of insufficient notice under the statute unnecessary.

On May 31, 1988, Judge Robert Mills of the Circuit Court

of George County declared "that the portion of the Miss. Code. Ann. § 11-37-101, et seq. (Supp. 1987) which provides for the pre-notice and pre-hearing seizure of property upon filing of the document specified therein and the posting of the specified bond is unconstitutional as it is a denial of due process of law...." The State of Mississippi, a Defendant in this case through its Attorney General, has likewise admitted the unconstitutionality of the statute.

The Court finds as a matter of law that Section 11-37-101 of the Mississippi Code, which states, "if any person...shall file a declaration....and shall present such pleadings to a judge...such judge shall issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said declaration....", does not provide such safeguards of procedure as are required by the Due Process Clause of the Fourteenth Amendment. The Court therefore finds that the taking of property of the Plaintiff, pursuant to a writ issued under this statute, was a taking of property without due process of law.

IT IS THEREFORE ORDERED that partial summary judgment is granted to the Plaintiff insofar as his request for declaratory judgment that the Mississippi replevin under bond statute is unconstitutional shall be granted by separate judgment.

IT IS FURTHER ORDERED that the Plaintiff shall present a Final Motion for Summary Judgment and an accompanying memorandum, containing all claims which continue against each Defendant, the legal bases for each of these claims, a statement pertaining to each claim as to whether it is ripe for summary judgment or whether a continuing question of material fact exists, and a statement as to the amount and form of damages being sought from each Defendant. This

motion is to be filed no later than twenty (20) days following entry of this Order.

IT IS ALSO ORDERED that each Defendant may respond to this Motion of the Plaintiff and present memoranda containing any pertinent defenses within fifteen (15) days of the filing of the Motion by the Plaintiff. The Plaintiff shall thereafter have ten (10) days within which to file his rebuttals.

SO ORDERED this the 13th day of April, 1989.

/s/
William H. Barbour, Jr.
William H. Barbour, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOWARD L. WYATT,
Plaintiff
vs.
BILL COLE; JOHN ROBBINS II; J.B. TORRENCE; RANKIN COUNTY, MISSISSIPPI; LLOYD S. JONES; WILEY MAGEE; CINDY JENSEN; ERNEST E. SMITH; SIMPSON COUNTY, MISSISSIPPI; RAY ROBERTS; AND MIKE MOORE, as Attorney General of the State of Mississippi,
Defendants

CIVIL ACTION
FILE NO.
J87-0421(B)

MEMORANDUM OPINION AND ORDER

This case is before the Court on Final Motion of the Plaintiff for Summary Judgment and on Motion for Summary Judgment by Simpson County, Mississippi, Lloyd Jones, Ernest Smith, Wiley Magee and Cindy Jensen ("Simpson County Defendants"), which Bill Cole and John Robbins II have joined. The Court has reviewed the pleadings and briefs submitted following its Memorandum Opinion and Order of April 13, 1989. Despite the style of the motion by the Plaintiff, certain issues have been reserved for trial, and the Court reads the motions presently before it as a motion for partial summary judgment on the issues of liability and a cross-motion for summary judgment. The Court reserves all questions concerning damages for trial. No genuine question of material fact continues as to the liability of the Defendants. The Court will grant the motion of the Plaintiff in part and deny it in part and

will grant the Motion of the Defendants, as set forth below.

I. Findings of Fact

The facts are set forth generally in the Memorandum Opinion and Order entered on April 13, 1989. *Wyatt v. Cole*, 710 F. Supp. 180, 181 (S.D. Miss. 1989). Defendant Bill Cole sought and obtained a Writ of Replevin with the assistance of his attorney, John Robbins II. The Writ was issued under Order of Judge Jerry Yeager of the Circuit Court of Simpson County, Mississippi, by Cindy Jensen, a deputy of Wiley magee, the Simpson County Circuit Clerk. The Writ was served by Sheriff Lloyd Jones and Deputy Sheriff Ernest Smith of Simpson County, by Ray Roberts, a wrangler, and by others, who on July 29 and 30, 1986, seized cattle and equipment owned by the partnership composed of Cole and Plaintiff Wyatt. A hearing on a Writ of Inquiry following service of process led Judge Yeager to dismiss the replevin and order the return of the seized goods, which have not yet been returned.

This Court granted Wyatt a declaratory judgment that the Mississippi replevin under bond statute, set forth at Section 11-37-101 of the Mississippi Code, was unconstitutional because it does not give the judicial official ordering the issuance of a writ any discretion to deny a writ in replevin prior to seizure. Wyatt now seeks damages, jointly and severally from Bill Cole, John Robbins II, Sheriff Lloyd Jones, Deputy Sheriff Ernest Smith and Simpson County. The Plaintiff seeks relief from the State of Mississippi through its Attorney General only if Simpson County is not liable. No relief is sought from Rankin County, Mississippi, Cindy Jensen, Ray Roberts, or Alberta Cole. In light of directions to counsel in the Order of April 13, 1986, the Court finds all claims against named defendants in their individual capacities not pursued in the Final Motion to have been waived by the Plaintiff.

II. Conclusion of Law

The Court has found that the seizure of Wyatt's interests was a taking of property without due process of law. *Wyatt*, 710 F. Supp. at 183. The Court now determines liability for any damages which may have resulted from this deprivation. The Civil Rights Act of 1871 provides that

> Every person who, under color of any statute...of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983.

A. Private Defendants

Wyatt seeks to hold Bill Cole, his former partner, and John Robbins, Cole's attorney, liable. A private citizen's use of a state-created scheme of attachment of private property is state action by that citizen which may be actionable under section 1983. *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982). Section 1983 is a broad framework that admits to few privileges from liability, and the Court looks to the historical common law for those. *Tower v. Glover*, 467 U.S. 914, 920 (1984) (legal services attorney who conspired with state official liable under section 1983). Cole sought the acquisition of property under color of state law, and he acquired that property in derogation of Wyatt's right to due process prior to its loss. Although he retains the property in violation of an order of a state judge, this does not mean the deprivation was not under color of state law.

Cole seeks to hold John Robbins II liable for his acts as an attorney in requesting and executing the writ of replevin. There is no immunity which attaches by nature of service as an attorney. *Tower v. Glover* 467 U.S. 914, 920 (1984). While an action strictly within the scope of representation of a client does not normally constitute an act under color of state law, see *Russell v. Millsap*, 781 F. 2d 381, 383 (5th Cir. 1985), an attorney is still a person who may conspire to act under color of state law in depriving another of secured rights. *Tower* 467 U.S. at 922. The distinction in federal law between conduct of client representation and conduct actionable under section 1983 is similar to the distinction of Mississippi law between privileged representation of counsel and actionable tortious conduct. See *Gold v. Labarre*, 455 So. 2d 739 (Miss. 1984), on appeal following remand, *Labarre v. Gold*, 520 So. 2d 1327 (Miss. 1987).

However, Cole and Robbins raise immunity to avoid liability. Private actors may be protected from liability for damages if they rely upon a presumptively valid attachment statute so long as the private actor neither knew nor should have known that the statute was unconstitutional. *Folsom Investment Company v. Moore*, 681 F. 2d 1032 (5th Cir. 1982). This standard is identical to the *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), test for state officials performing discretionary functions. *Folsom*, 681 F. 2d at 1932. The Defendants claim that they were entitled to rely upon the statutory enactment of the legislature. The Plaintiff claims that the infirmity should have been obvious. However, this dispute is not of material fact. The intent of the Fifth Circuit is creating the immunity is obviously to allow citizens the reasonable sanctuary of the law. The replevin statute was enacted following the invalidation of an earlier statute, and until the later statute was pronounced

to be unconstitutional, the individual defendants had a right to rely upon it.

However, this does not assure the availability of good faith immunity in this case. The property was seized as a result of state action by the private citizen. The continued possession of the property following judgment of the statute's unconstitutional system bars Cole from asserting good faith as a basis for immunity. Retention of property seized under a valid state statute is a continuing deprivation even after the state's basis for the seizure is abandoned. *Story v. United States*, 629 F. Supp. 1174 (N.D. Miss. 1986). The Court finds that Bill Cole acted under color of state law in depriving the Plaintiff of his property without due process of law and that his continued possession of the fruits of that deprivation following the time he should have known that the statute he had relied upon was unconstitutional, bars him from asserting a defense of good faith reliance. Summary judgment as to Cole's liability in the event any damages are proved will be granted to the Plaintiff.

The Court finds that there is a genuine issue of material fact as to whether John Robbins II performed any acts subsequent to the ruling of this Court declaring the statute unconstitutional which would subject him to liability. Summary judgment against Robbins is denied and this issue is held over for trial.

Ray Roberts is before this Court pro se. Although he has not moved for summary judgment, his defenses as an agent of the sheriff in seizing property under the writ are similar to those of the County Defendants below. The Court has found that the Plaintiff has waived his claim against Roberts and he will be dismissed.

B. County Defendants

The Second Amended Complaint seeks relief from Sheriff J.B. Torrence, Sheriff Lloyd Jones, Circuit Clerk Wiley Magee, Deputy Clerk Cindy Jensen, and Deputy Sheriff Ernest Smith, each in their official and individual capacities. The Memorandum Opinion and Order entered on April 13, 1989 ordered the Plaintiff to

> present a Final Motion for Summary Judgment and an accompanying memorandum, containing all claims which continue against each Defendant, the legal bases for these claims, a statement pertaining to each claim as to whether it is ripe for summary judgment or whether a continuing question of material fact exists, and a statement as to the amount and form of damages being sought from each Defendant.

Wyatt, 710 F. Supp. at 183. The Final Motion for Summary Judgment was submitted to the Court, following an extension, on May 25, 1989. It stated claims against Simpson County, against "Private Defendants" Cole and Robbins and against "Sheriff Lloyd Jones and Deputy Sheriff Earnest Smith." The Simpson County Defendants moved for summary judgment on claims against Wiley Magee and Cindy Jensen. The Plaintiff responded by claiming that he had not abandoned his claim against them, but that "the court's ruling as to the sheriff's liability will be dispositive of the clerk and deputy clerk." The Court reads these pleadings in light of its instructions to counsel and finds that no relief is sought against the Simpson County defendants in their individual capacities, any such claims having been waived by the Plaintiff. In the event that a claim is meant to continue against these Defendants indivi-

dually, the Court notes that they are each entitled to immunity under *Folsom*, as discussed in part II.A, above.

The Court now addresses the liability against the individual Simpson County Defendants in their official capacities and against Simpson County, Mississippi ("the County"). The thrust of the Plaintiff's claim is that policy-making officials of the County caused the wrongful deprivation and the County is liable under section 1983 per *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), and its progeny.

A county cannot avoid liability under section 1983 by claiming immunity under the Eleventh Amendment. *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Mount Health City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). Neither may it assert good faith reliance of its officials on state law. *Owen v. Independence, Missouri*, 445 U. S. 622 (1980). The County has attempted to cloak its sheriff or itself in extended judicial immunity per *Williams v. Wood*, 612 F. 2d 982 (5th Cir 1980). While this theory would establish immunity over an individual clerk, such as Magee or Jensen, it does not reach to the governmental entity they represent. The County is therefore a "person" subject to suit under Section 1983 under the dictates of *Monell*.

Liability accrues to a county if it implements an unconstitutional policy or regulation adopted and promulgated by the county's officers. *Monell*, 436 U. S. at 690. The United States Court of Appeals for the Fifth Circuit has applied a bifurcated test to find such a policy if there is either a statement or regulation adopted by the county's lawmakers or a persistent widespread practice so common as to "constitute a custom which fairly represent municipal policy." *Webster v. City of Houston*, 735 F. 2d 838 (5th Cir. 1984) (en banc).

The County is not liable if its officers act as agents of the state, directly carrying out state policy. *Familias Unidas v. Briscoe*, 619 F. 2d 391 (5th Cir. 1980). This is distinct from a good faith defense, denied in *Owen* to a city whose officials unconstitutionally fired a police chief but did not act with malice. *Owen*, 445 U. S. at 629. The question is whether officials of the county acted for an autonomous entity subject to suit, or for a state sovereign immune from liability. Such immunity may be determined by the designation of the sovereign in creating the entity or in designating its tasks. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (bi-state agency not immune when both states that create it disclaim its immunity).

The acts of a county judge may be official policy of the county if his decisions may be fairly attributable to the county, as opposed to his sole discretion or to the state. *Crane v. State of Texas*, 759 F. 2d 412 (5th Cir. 1985) citing *Familias Unidas*, 619 F. 2d 391. The acts of a county sheriff or prosecutor may be official policy even if they are authorized under state law, so long there is discretion in the content of the policy to be exercised by the appropriate county officials. *Pembaur v. Cincinnati*, 475 U.S. at 482, 483.

There is no question that the judge and sheriff, and their assistants, were acting according to a state statute. There is also no question that the judge was directed by the statute to grant the writ. Miss Code Ann. § 11-37-101 (1972). The sheriff was obligated to serve it and seize the property. Miss Code Ann. § 11-37-109 (1972). The very basis of the declaratory relief granted to the Plaintiff was that state law gave no discretion to the judge to deny the writ or prevent the seizure. This same flaw forced the sheriff to seize the property. These acts are acts of the state, not of the county. There is no liability to

the county for acting as the statutes of its state require. To hold otherwise would effectively negate the operation of the Eleventh Amendment, whose operation in this sphere has recently been reaffirmed. See *Will v. Michigan Department of State Police*, No. 87-1207, slip op. decided (U.S. June 15, 1989).

C. The Attorney General

The Plaintiff pursues a claim against the Attorney General in his official capacity only as an alternative to a claim against Simpson County and its officers in their official capacities. In light of its ruling concerning the County, the Court notes that no liability under section 1983 may be assigned to this Defendant. State officers in their official capacities are not "persons" within the meaning of the Civil Rights Act of 1871. *will v. Michigan Department of State Police*, No. 87-1207, slip op. decided (U.S. June 15, 1989. Unless sued for prospective unjunctive relief, no remedy is available under 1983 against the state officer. *Will* at 12. The Attorney General has not waived immunity generally or in this cause. Therefore, no claim exists against Mike Moore in his capacity as Attorney General.

IT IS THEREFORE ORDERED that the Motion of the Plaintiff for Summary Judgment is granted insofar as Bill Cole shall be liable for any damages which the Plaintiff can demonstrate in this cause.

IT IS FURTHER ORDERED that the Motion for Summary Judgment of Plaintiff against John Robbins II is denied.

IT IS FURTHER ORDERED that the Motion of the Simpson County Defendants for Summary Judgment is granted, and that Simpson County, Wiley Magee, Cindy Jensen, Lloyd Jones, and Ernest Smith are dismissed from this cause.

IT IS FURTHER ORDERED that all claims in this action against Ray Roberts are dismissed.

IT IS FURTHER ORDERED that in all other respects, the Final Motion for Summary Judgment of the Plaintiff is denied.

SO ORDERED this the 10th day of August, 1989.

|s|
William H. Barbour, Jr.
William H. Barbour, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOWARD L. WYATT	CIVIL ACTION
vs.	FILE NO.
BILL COLE, et. al.	J87-0421(B)

MEMORANDUM OPINION AND ORDER

This cause is before the Court on Motions by Plaintiff and several of the Defendants for Attorney's Fees. Having considered the Motions and supporting and opposing documents, the Court finds that the Plaintiff should be awarded attorney's fees against the State of Mississippi for the period beginning with the initiation of the litigation and ending with the entry of an Order by this Court declaring the replevin statute at issue to be unconstitutional and also for the period covering the parties' litigation of the attorney's fees issue. The Court also finds that no attorney's fees should be awarded to any of the Defendants.

I. FACTUAL BACKGROUND

Plaintiff filed the instant action in this court in July 1987 pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 2201. Plaintiff alleged violation of his constitutional rights through the deprivation of property by Defendants pursuant to a writ of replevin under the Mississippi replevin statute and pendent state law claims for abuse of process. On September 14, 1987, the State of Mississippi filed a Motion to Intervene which the Court granted on February 29, 1988. On April 4, 1988, the Court allowed the State to appear as Amicus Curiae rather than as an intervening party, and on April 18, 1988, Plaintiff amended

its Complaint by leave of the Court to add the State as a Defendant. On September 19, 1988, Attorney General Mike Moore in his official capacity was substituted for the State as a Defendant.

On April 13, 1989, the Court granted Plaintiff a declaratory judgment that the Mississippi replevin under bond statute, Miss. Code Ann. § 11-37-101 (Supp. 1989), was unconstitutional because it did not give the judicial official ordering the issuance of a writ any discretion to deny a writ in replevin prior to seizure. On August 10, 1989, this Court issued an opinion granting summary judgment for Plaintiff against Defendant Bill Cole insofar as Cole would be liable for any damages which Plaintiff could demonstrate at trial, denying summary judgment for Plaintiff against Defendant John Robbins II, and dismissing all claims of Plaintiff against Defendants Simpson County, Wiley Magee, Cindy Jensen, Lloyd Jones, Ernest Smith, and Ray Roberts.

The case was set for trial beginning on August 22, 1989. On that date the Court dismissed Defendant Robbins from the case upon the statement of Plaintiff's counsel that they could prove no act of Robbins occurring after the Court declared the replevin statute unconstitutional. Counsel for Plaintiff also revealed that they could not prove actual damages by Cole accruing after the declaration of unconstitutionality. The Court retained jurisdiction to consider motions for Attorney's fees.

On September 22, 1989, Plaintiff filed his Motion for Attorney's Fees seeking nominal damages and/or attorney's fees from Defendant Attorney General Mike Moore in his official capacity, Defendant Cole, Defendant Robbins, Defendant Simpson County, and Defendants Sheriff Lloyd Jones and Circuit Clerk Wiley Magee of Simpson County in their individual

capacities.

On October 4, 1989, Defendants Jones, Magee, Cindy Jensen, Ernest E. Smith, and Simpson County filed a Motion for Attorney's Fees against Plaintiff. Defendants Cole and Robbins have also requested assessment of attorney's fees and costs against Plaintiff in responding to Plaintiff's Motion.

II. CONCLUSIONS OF LAW

Congress has made explicit provision for the award of attorney's fees in certain civil rights cases in the Civil Rights Attorney's Fees Awards Act of 1976, which states in relevant part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988. As the legislative history of the statute indicates and as the United States Supreme Court has recognized, this statute grants broad authority to the courts to award attorney's fees to plaintiffs in civil rights cases. *Smith v. Robinson*, 468 U.S. 992, 1006 (1984) (citing *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980); *Hutto v. Finney*, 437 U.S. 678, 694 (1978); and S. Rep. No. 94-1011, p. 4 (1976)). Indeed a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). In this case Plaintiff has prevailed on the central issue of the unconstitutionality of the Mississippi replevin statute and is thus entitled to attorney's fees. The Court must next determine, then, from whom Plaintiff should

recover and how much.

A. From Whom Should Plaintiff Recover?

Plaintiff seeks an award of attorney's fees against Defendants Sheriff Lloyd Jones and Circuit Clerk Wiley Magee of Simpson County in their individual capacities, Simpson County, John Robbins, Bill Cole, and Attorney General Mike Moore.

1. The Simpson County Defendants

Since the Court noted in its August 10 opinion that relief was sought against certain officials of Simpson County in their official capacities and not in their individual capacities, *Wyatt v. Cole et al.*, No. J87-0421(B), slip op. at 7 (S.D. Miss. Aug. 10, 1989), there can be no liability for attorney's fees by the county officials in their individual capacities. The Court also found on August 10 that the acts of the Simpson County officials were "acts of the state, not of the county" and that "[t]here is no liability to the county for acting as the statutes of the state require." Id. at 10. Therefore, since there is no substantive liability on the part of Simpson County itself, it cannot be held liable for attorney's fees. See *Familias Unidas v. Briscoe*, 619 F. 2d 391, 406 (5th Cir. 1980) (where county had been found not susceptible to suit under 1983 in that county official, in implementing statute later found to be unconstitutional, had merely been effectuating state policy embodied in statute, county held not liable for attorney's fees). Furthermore, since the acts of the Simpson County officials were essentially acts of the State of Mississippi, any award of attorney's fees against those officials in their official capacities is in effect an award against the State. See id. (because acts of county officials in implementing state policy were deemed to be acts of state, and because award of attorney's fees under section 1988 against person in official capacity is treated as

award against governmental body of which person is representative, state and not count;y held liable for attorney's fees). The Court finds that the Simpson County officials against whom Plaintiff seeks an award of fees, Sheriff Jones and Circuit Clerk Magee, are liable for attorney's fees in their official capacities, thus rendering the State of Mississippi liable for attorney's fees on their behalf.[1] Accordingly, neither Simpson County nor any officer of the County bear responsibility for the payment of any attorney's fees.

2. Defendants Robbins and Cole

As the court found in its August 10 opinion, summary judgment could not be entered as to whether Robbins, who is Defendant Cole's attorney, had performed any acts subsequent to the declaration of the Court that the replevin statute was unconstitutional which would subject him to liability. The issue was thus reserved for trial. However, as noted supra Plaintiff's counsel admitted on the initial day of trial that they could prove no act of Robbins after the declaration of unconstitutionality. Therefore, since the Court also found on August 10 that the individual defendants, including Robbins, had a right to rely upon the replevin statute until it was pronounced unconstitutional and that such right constituted good faith immunity, Robbins cannot be held liable for attorney's fees. See *Familias Unidas*, 619 F. 2d at 406 (same good faith immunity insulating individual defendants from personal liability for

[1]As explained infra, the award of attorney's fees granted against the State of Mississippi does not imply that the State is liable for damages, either nominal or otherwise. In fact, the State is immune from damages under the Eleventh Amendment. Nonetheless, like the State of Texas in *Familias Unidas*, the State of Mississippi, though immune from actual damages, is liable for attorney's fees.

damages also forecloses personal liability for plaintiff's attorney's fees).

For a similar reason, Defendant Cole must be held free from liability for attorney's fees. Concerning Cole, the Court found on August 10 that he had "acted under color of state law in depriving the Plaintiff of his property without due process of law and that his continued possession of the fruits of that deprivation following the time he should have known that the statute he had relied upon was unconstitutional, bars him from asserting a defense of good faith reliance." *Wyatt*, slip op. at 5-6. However, Plaintiff was unable at trial to prove any damages caused by Cole following the Court's pronouncement of unconstitutionality. Thus, because Plaintiff did not prevail against Cole on the damages issue and because Cole was entitled to the shield of good faith immunity before that pronouncement, Cole is free from liability for attorney's fees.

SO ORDERED this the 8th day of January, 1990.

|s|
William H. Barbour, Jr.
William H. Barbour, Jr.
United States District Judge

(4)

No. 91-126

In The

Supreme Court of the United States

October Term, 1991

HOWARD WYATT,
Petitioner,

vs.

BILL COLE and JOHN ROBBINS, II,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

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November 21, 1991

QUESTION PRESENTED

Do private persons, who initiate use of an unconstitutional statute, have available the qualified immunity of public officials?

PARTIES TO THE PROCEEDING

In addition to the Petitioner, Howard Wyatt, and the Respondents, Bill Cole and John Robbins, II, the remaining Defendants below, who are all governments or governmental officials, were: Rankin and Simpson Counties, Mississippi; J.B. Torrence; Lloyd S. Jones; Wiley Magee; Cindy Jenson; Ernest E. Smith; Ray Roberts; and Michael Moore, in his official capacity as Attorney General of the State of Mississippi. The only Defendants now before this Court are the private persons who initiated the unconstitutional procedure, Respondents Cole and Robbins.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States District Court, holding the Mississippi replevin statute unconstitutional, is reported at 710 F. Supp. 180, and is reprinted in the Joint Appendix ("J.A.") at 3-9. The unreported decision of the United States District Court, holding that the individual Defendants are entitled to good faith immunity, is reprinted at J.A. 10-19. The opinion of the United States Court of Appeals for the Fifth Circuit holding that the private Defendants are entitled to immunity, is reported at 928 F. 2d. 718, and is reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 13a-37a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit

entered judgment on April 17, 1991. The Petition for Writ of Certiorari was filed on July 16, 1991, and was granted on October 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The federal statute involved is 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In July, 1986, Petitioner, Howard Wyatt, and Respondent, Bill Cole, were partners in the cattle business. Pet. App. 19a. Cole wanted to break up the partnership, and discussed this with Wyatt, but the two could not reach an agreement. Cole then obtained the services of Respondent, John Robbins, II, an attorney. Pet. App. 19a.

Attorney Robbins, on Cole's behalf, effected a division of the partnership property by using the Mississippi replevin statute. *See* Pet. App. 19a. This statute permits one to obtain property in possession of another by swearing to a state court judge that he is entitled to that property, and that his adversary "wrongfully took and detains the property". Pet. App. 20a n.1, quoting Miss. Code Ann., § 11-37-101. Upon receiving such a sworn statement and upon the posting of a bond, the state replevin statute provides that the state court judge "shall" order the "replevin" of the property to the Plaintiff prior to notice or opportunity for a due process hearing. *Id.*

Pursuant to this replevin statute, Respondents obtained a Writ of Replevin from a state court judge. J.A. 4. This replevin

order directed the county sheriff to seize, without prior notice or hearing, some of the partnership cattle and other property from the Petitioner. J.A. 4. On July 25, 1986, pursuant to the replevin order obtained from the Circuit Judge, the Respondents accompanied several county law enforcement officers to Petitioner's property for the purpose of seizing the property. Pet. App. 19a. Wyatt begged the officers and Respondents not to take the property since he "owned an interest in the cattle" and he "had not had any kind of summons or hearing in court." Affidavit of Howard Wyatt, Record at ("R.") 1143-44. Petitioner also told Respondents and the law enforcement officers that running the cattle in the July heat would ruin them. R. 1143. However, the officers and Respondents ignored Petitioner's protests and

> caused the cattle to be chased with horses and dogs throughout the fields and fences in spite of all (Wyatt's) efforts to prevent them. . . . As a result of this conduct (Wyatt) had to consult a psychiatrist and . . . was hospitalized and treated by a psychiatrist at the Riverside Hospital in Jackson, Mississippi.

R. 1143-44. Respondents and the officers finally captured 23 head of cattle, as authorized by the Writ of Replevin.[1] Cole kept the cattle for a short time in Mississippi, then took them to Texas. R. 1234-36. On October 1, 1986, a post-seizure replevin hearing was held by the state court judge, who ordered the complaint in replevin to be dismissed, and ordered the property returned to Petitioner. Pet. App. 20a. Cole, however, declined to follow the state court order. J.A. 5. Rather than pursuing Cole in the state courts, Petitioner commenced this action in the United States District Court for the Southern District of Mississippi, with jurisdiction based on 28 U.S.C. § 1331. J.A. 4. The complaint alleged that the Mississippi replevin statute offends due process, and it sought injunctive relief and damages against Respondents and the governmental actors who caused this hearingless seizure. R. 1. On April 13, 1989, the District Court entered its Memoran-

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[1]The Writ directed a seizure of 23 head of cattle, but left it to the officers' discretion to decide which cattle were to be seized.

dum Opinion and Order holding the Mississippi replevin statute unconstitutional as denying due process. J.A. 8-9.

On August 10, 1989, the District Court entered its Memorandum Opinion finding that the governmental officers were all entitled to a "good faith" defense, and finding that the local governments were acting as state agencies at the time in question and were, thus, immune. J.A. 15-18. The District Court also found that the private Defendants (Robbins and Cole) were also entitled to the same qualified immunity as were the governmental Defendants. J.A. 13-14. Because this qualified immunity would not apply to acts done following the date the statute was declared unconstitutional, a trial was held on the sole issue of whether any damages that might have accrued since that date. *See* Pet. App. 21a. At the trial, Petitioner conceded that he could not prove that any damages had accrued since the statute was declared unconstitutional. All of his damages consisted of deterioration in the value of the remaining herd caused by chasing them in the hot July heat,[2] and the mental stress[3] caused by having his property seized without a hearing, all of which occurred before this action was begun.[4]

Petitioner appealed the District Court's denial of damages to the Fifth Circuit, which agreed with the District Court's finding that all Defendants, including the private Defendants, are immune from damages. Pet. App. 25a-26a. In addition, the Court immunized Respondents from paying any portion of Petitioner's attorneys' fees in obtaining the declaration that the replevin statute was unconstitutional on the ground that the Defendants' good faith immunity prevented liability for the fees as well. Pet.

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[2]Testimony at trial was that "Brahman" cattle become mean and unmanageable if they are mistreated, such as occurs when they are chased with horses and dogs. Transcript at 61-62.

[3]Mental stress is compensable as an item of damages for a denial of due process. *Carey v. Piphus*, 435 U.S. 247, 262-64 (1978).

[4]Petitioner's counsel had previously determined the bond given by Cole was uncollectible.

App. 27a.

SUMMARY OF THE ARGUMENT

It is now the law of this case that Petitioner's constitutional rights were violated and that this violation caused him great harm. His property was seized without any notice or opportunity for a hearing, and the remainder of his herd was chased with horses and dogs in the hot July heat, thereby causing them to lose value. The hearingless seizure also caused Wyatt to suffer psychiatric trauma, necessitating hospitalization. He was unable to recover any of his damages because of the worthless state court replevin bond. Even though 42 U.S.C. § 1983 appears to grant Petitioner a remedy in damages for this violation of his constitutional rights, both lower courts denied Petitioner any remedy by extending the qualified immunity afforded to public officials to private actors who initiate the use of an unconstitutional statute.

Petitioner should not be deprived of that remedy by extending the qualified immunities enjoyed by government officials to private actors. The statute does not provide for this protection, and neither the common law nor the purposes of 1983 support this extension. Moreover, none of the policy reasons used to justify immunities to public officials is applicable to private parties who, in private pursuits for their personal financial gains, deprive innocent victims of their constitutional rights.

ARGUMENT

NEITHER THE COMMON LAW, THE PURPOSES OF SECTION 1983, NOR PUBLIC POLICY JUSTIFIES AN EXTENSION OF THE DOCTRINE OF QUALIFIED IMMUNITY TO PRIVATE PERSONS.

It is settled law that private defendants, who, under color of state law violate the constitutional rights of an individual, are liable under 42 U.S.C. § 1983. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931-32 (1982); *Dennis v. Sparks*, 449 U.S. 24, 27 (1981). The question presented here is whether private persons who deprive individuals of their federal rights are entitled to the qualified

immunity to which the state officials, who joined them in their unlawful conduct, may be entitled. As this Court recognized in *Owen v. City of Independence*, 445 U.S. 622, 635 (1980), quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), "by its terms, § 1983 'creates a species of tort liability that on its face admits of no immunities.' ... Rather, the Act imposes liability on 'every person' who, under color of state law or custom, 'subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any right, privileges, or immunities secured by the Constitution and laws.'" *Id.*, quoting section 1983.

In recognition of "the significance of the societal interest in compensating the innocent victims of governmental misconduct," this Court has been willing to afford immunities from a section 1983 action only under the most limited of circumstances. *Owen*, 445 U.S. at 653. To decide whether a party is entitled to an immunity, the Court looks at whether (1) there was a common law basis in tort for affording protection when the Civil Rights Act was enacted in 1871; (2) the immunity is consonant with the history and purposes of section 1983 actions; and (3) there exist strong public policy reasons that would require the Court to carve out an exemption from liability for the party who injures innocent citizens through the use of an unconstitutional state law. *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981); *see also Hafer v. Melo*, No. 90-681, slip op. (S.Ct. Nov. 5, 1991) at 7 (describing limited class of officials who are entitled to absolute or qualified immunities); *Owen*, 445 U.S. at 637-38 (same). Respondents cannot meet any of these requirements.

1. Private Persons Possessed No Immunities From a Suit of This Kind at Common Law.

There is no historical basis for a general common law immunity for private persons from torts arising out of the unlawful exercise of governmental power. *Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir. 1988); *see Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1441 (11th Cir. 1987). The qualified immunity afforded by this Court's decisions to some government actors accused of the wrongful exercise of government power is based on "objective

reasonableness," a standard applied as a matter of law. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) ("defining the limits of qualified immunity essentially in objective terms"); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("subjective beliefs about the [challenged conduct] are irrelevant"). At common law, private persons accused of wrongful conduct could never invoke an immunity as a matter of law, and thus enjoyed no immunity analogous to the qualified immunity now afforded to government actors. *Duncan, supra*.

At common law, however, private persons who were sued for malicious prosecution and, in some jurisdictions, wrongful attachment, had a limited affirmative defense of good faith, based on subjective factors, where the defendants, without malice, had probable cause to believe that they had a right to undertake actions that were ultimately shown to be unlawful. W. Prosser and W. Keeton, *The Law of Torts*, §§ 119, 120 (5th Ed. 1984); *see also* 1 F. Harper, F. James, Jr., O. Gray, *The Law of Torts*, § 4.8 n.5 (2d Ed. 1986) (describing the "little uniformity" across jurisdictions, concerning liability for wrongful attachment). Nonetheless, the existence of this subjectively-based defense, which was available only for some of the analogous types of tort violations giving rise to section 1983 liability, and only in some jurisdictions, does not provide any reason to create an immunity for all private defendants, irrespective of the underlying contexts or jurisdictions in which section 1983 claims may arise. *See Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (discussing the unsuitability of tort-by-tort approach, and rejecting it in favor of an "across the board" general principle). Moreover, as this Court counseled in *Anderson*, it has

> never [been] suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official

action.

483 U.S. at 645. Because there was no general common law immunity for private persons for torts involving their participation in unlawful governmental actions, and because the good faith subjective defense was available only for particular torts, in particular jurisdictions, Respondents are unable to meet the first burden of demonstrating that an immunity should be read into a statute which on its face allows for none because of a comparable common law immunity.

2. An Immunity For Private Persons Contravenes The Purposes of Section 1983.

"The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen*, 445 U.S. at 650, citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961), quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe*, 365 U.S. at 187. Section 1983 was designed to be a remedial statute, allowing private parties access to federal courts for unconstitutional wrongs perpetrated by state actors, including those who, like Respondents here, avail themselves of the power of state law.

This Court's precedents make clear that section 1983 provides for a cause of action against a private individual. *Lugar*, 457 U.S. at 937 (private parties may be charged with deprivation of the right when they act with or obtain aid from the state); *Adickes v. Kress & Co.*, 398 U.S. 144, 174 n.44 (1970) (plaintiff sought damages from the private actor alone and neither state nor state officials joined as defendants).

Nevertheless, if either an immunity, based on "objective reasonableness," or a good-faith defense, based on both subjective and objective factors, is afforded to private actors, the Court will, in essence, be granting an absolute immunity for all private

parties from suits for damages. The reason that this ruling would be the equivalent of absolute immunity, which is now accorded only to the President, judges, and prosecutors for conduct within the scope of their positions, *see Hafer*, slip op. at 7, is that it would be practically impossible for any plaintiff to show either that private actors knew or should have known of the wrongfulness of their conduct, or that reasonable persons in those persons' place would have known of the violation, with the possible exception of members of the bar. Unlike government employees, who receive training in the law related to their position, or legally-trained professionals, few, if any, private defendants will have any special knowledge of the areas of law which give rise to a deprivation of someone's federal rights. As a consequence, almost all private section 1983 defendants will be able to say that they had no idea that their conduct was, or would be considered later to have been, unlawful. For example, Respondent Cole could quite plausibly argue that he never imagined that the Mississippi statute was unconstitutional or that his conduct in relying on it was unlawful. Indeed, under a *Harlow-Creighton* standard, even the well-informed malicious person could take refuge in the probability that most reasonable people would not know that their conduct, cloaked in state law, violated someone's constitutional rights. *See Creighton*, 483 U.S. at 641. Thus, allowing a qualified or good faith immunity to private parties would, as a practical matter, eliminate any possibility of collecting damages from them.

In *Owen*, the Court recognized the potential for this outcome, stating that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense." 445 U.S. at 651. Just as in *Owen*, this Court should eschew any effort to create an immunity, whether based on subjective or objective factors, because either will essentially disembowel the force behind the statute and leave many innocent victims "remediless." *Id.* ("such a result should not be tolerated"). The absence of a damages remedy will create a disincentive for individuals "to seek vindication of those constitutional deprivations that have not previously been clearly defined." *Id.* at 651 n.33. The power of section 1983 is eroded with every immunity afforded or every category of person exonerated, because the panoply of potential defendants decreases and the chances of the

injured party being made whole reduced accordingly. *See id.* When Congress enacted remedial legislation with the scope of section 1983, it could not have intended for a cause of action to rest against only truly incompetent government actors and municipalities. Therefore, granting immunity would contravene, not support, the purposes of section 1983.

3. There Is No Public Policy Reason to Immunize Private Persons Acting for Their Own Gain Who Deprive Innocent Victims of Their Federal Rights.

This Court has taken a "functional" approach to immunities by examining "the nature of the functions with which a particular official or class of officials has been lawfully entrusted" and then evaluating "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1988). The Court's decisions have been grounded in the nature of the government actor's individual responsibilities, rather than the specific status of the government actor. This approach, rooted in governmental functions and common law considerations of sovereignty and separation of powers, strongly suggests that private actors, with no job-defined governmental function, are not entitled to immunity. *See Owen*, 445 U.S. at 647-48; *Scheuer v. Rhodes*, 416 U.S. 232, 239 & n.4 (1974).

Although the Court has recognized the importance of granting government employees some level of immunity when they act in their official roles, no decision has afforded an immunity to private parties who utilize state power to deprive an individual of their constitutional rights. Even where private parties and government officials have conspired to deprive plaintiffs of their constitutional rights, this Court has refused to grant private actors immunity derivatively, on the theory that it was necessary to advance policies that justified granting the immunity to the government actor. *Dennis v. Sparks*, 449 U.S. 24, 29 (1981) ("Petitioner nevertheless insists that unless he is held to have an immunity derived from that of the judge, the latter's official immunity will be seriously eroded. We are unpersuaded.").

The Court has identified several reasons why government actors should be entitled to some form of immunity, none of which applies to private parties. These include: (1) shielding government actors from distracting lawsuits that will consume the time that should be devoted to their jobs; (2) removing any considerations that would deter government action or introduce inappropriate factors into the decisionmaking process of government actors; and (3) attracting qualified personnel to government. In *Forrester*, the Court summarized these justifications, noting that the potential for personal monetary liability may "create perverse incentives that operate to *inhibit* officials in the proper performance of their duties." 484 U.S. at 223 (emphasis in original). The Court explained that "[w]hen officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Id.* Consequently, the Court concluded that this exposure to liability "may detract from the rule of law instead of contributing to it." *Id.*; *see also Owen*, 445 U.S. at 655-56 (personal liability will introduce unwarranted considerations into decisionmaking process, thus paralyzing governing official's decisiveness and distorting his judgment on matters of public policy); *Scheuer*, 416 U.S. at 240 (expressing concern over government actor's liability for merely performing duties of job, rendering officials overcautious and stymieing ability to attract qualified persons into public service); *Anderson*, 483 U.S. at 638 ("risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"); *Harlow*, 457 U.S. at 814 (delineating "social costs" of litigation against public officials).

Where the Court has concluded "that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability," it has cautioned that those decisions were "not to be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct." *Owen*, 445 U.S. at 652-53. As the holding in *Owen* confirms, none of the policy reasons identified to support affording immunities to government

officials, acting in their official roles, is present here.

Unlike government officials, private parties do not face the split-second, ever present decisionmaking requirements of office and thus are not confronted with a constant threat of liability. *Scheuer*, 416 U.S. at 247; *Downs v. Sawtelle*, 574 F.2d 1, 15 (1st Cir. 1978). Unlike government officials, private actors do not face the risk of liability for merely performing the duties of their jobs. For example, although Respondents did not have to initiate the wrongful replevin action here, the county sheriff who took the state court's order to seize the cattle had to enforce the Mississippi replevin statute, or *he* would have been subject to liability for failure to perform his job. *Cf. DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714, 722 (10th Cir. 1988) (failure to afford immunity places government contractor "between Scylla and Charybidis") (footnote omitted).

Similarly, the concern that government actors may consider inappropriate factors in their decisionmaking, such as their likelihood of being sued, does not exist in denying private actors immunity. On the contrary, the opposite incentive is presented: private parties *should* think twice before they undertake actions for their own financial gain that have the potential to unconstitutionally wrong someone, and they *should* be discouraged from taking refuge in or invoking state law for wrongful behavior. Furthermore, denying private parties immunity raises no policy concerns involving the ability of the government to attract qualified persons into public service. In short, none of the "social costs" present in *Harlow* is present here, and accordingly, contrary to the Fifth Circuit's reasoning, no anomaly results from affording government actors immunity, while denying private actors the same defense.

For many of the same reasons, the Court should reject the Fifth Circuit's conclusion that the need to shield citizens from monetary damages when they resort to processes which they believe to be valid, or have no reason to know are invalid, provides the rationale for affording Respondents immunity. The court below impermissibly sought to protect the ignorant, but nonetheless self-interested party, from any "unfairness" resulting from

invoking "presumptively valid state laws," and in doing so thereby shifted the burden of the wrongdoing to the harmed and innocent individual. The judiciary, however, may not graft immunities or defenses for private actors onto section 1983 to undermine, in piecemeal fashion, the determination made by Congress that innocent victims of constitutional wrongs should be afforded a remedy. *See Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

In enacting section 1983, Congress made the basic choice to provide victims of constitutional wrongs, undertaken under state authority, a damages remedy. In *Owen*, the Court denied immunity in a suit by "the innocent individual who is harmed by an abuse of governmental authority" where a municipal entity whose employees committed the wrongs were personally immune. Just as in *Owen*, where the Court carefully distinguished the reasons for affording immunities to government actors, from the reasons for not affording immunity to municipalities, the Court here should find that there is no reason to preclude the victimized individual from seeking damages against a private actor who -- unlike a municipality that acts on the public's behalf -- wrongs an individual for personal gain. *See Owen*, 445 U.S. at 656-57. Because Respondents acted for their own personal gain, and thereby injured Petitioner, it is they, not Petitioner, who should bear the risk that the actions they chose to take, were found to violate the Constitution.

CONCLUSION

The judgment should be reversed and remanded for a determination of Petitioner's damages caused by Respondents' initiation of the unconstitutional replevin procedure.

Respectfully submitted,

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November 21, 1991

(5)

No. 91-126

In The

Supreme Court of the United States

October Term, 1991

HOWARD WYATT,

Petitioner,

vs.

BILL COLE and JOHN ROBBINS, II,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether private parties found to be joint participants in state action are entitled to qualified immunity?

2. Whether the *Harlow* objective test for determining the application of qualified immunity to public officials is the appropriate test in the private party context?

3. Whether the lower courts correctly applied qualified immunity in the circumstances of this case?

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BRIEF OF RESPONDENT

OPINIONS BELOW

The United States District Court opinion holding the Mississippi replevin under bond statute unconstitutional appears at 710 F. Supp. 180 and is at Joint Appendix ("J.A.") at 3-9. The unreported decision of that Court which holds that the individual defendants are entitled to qualified immunity is reprinted at J.A. 10-19. The United States Court of Appeals for the Fifth Circuit opinion, which holds that the private defendants are entitled to qualified immunity, appears at 928 F.2d 718, and is in the Appendix to the Petition for Writ of Certiorari ("Pet.App.") 13a-37a.

JURISDICTION

Judgment was entered by the United States Court of Appeals for the Fifth Circuit on April 17, 1991. The Petition for Writ of Certiorari was filed July 16, 1991 and granted October 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Howard Wyatt, the Petitioner, and one of the Respondents, Bill Cole, were partners in the cattle business. Pet.App. 19a. A disagreement arose between the two which precipitated the break up of the partnership. Cole sought the services of Respondent, John Robbins, II, an attorney in Brandon, Mississippi. Pet.App. 19a. Robbins filed a Complaint in the Simpson County, Mississippi Circuit Court accompanied by a replevin bond in the

amount of $18,000. The circuit Judge issued a writ of replevin according to Mississippi Code § 11-37-101 which had undergone major revisions in 1975, and which had not been invalidated by any reported decision. The Sheriff of Simpson County, Mississippi executed the writ in July of 1986. At that time, twenty-four head of cattle, a tractor, and tractor parts were seized.

The writ and a summons were served on Wyatt the next day following the seizure. In October 1986 an order was entered continuing the bond, but dismissing the writ of replevin at the cost of Wyatt. Cole was ordered to return the seized property to Wyatt, or if the property was not available to pay damages to Wyatt along with any damages for wrongful suing out of the writ of replevin. J.A. 4. This circuit court action was dismissed without prejudice although Wyatt had not yet received the seized property. *Id.*

Wyatt chose to file this action in the United States District Court for the Southern District of Mississippi, rather than to pursue his remedy for wrongful suing out of the replevin in state court. Wyatt's complaint was based on a claim that § 11-37-101 denied him due process. Wyatt sought injunctive relief and damages against Cole and Robbins, the Sheriff and his assistants, Simpson County, Mississippi, and the State of Mississippi (for whom the Attorney General of the State of Mississippi was later substituted).

The district court entered a memorandum opinion and order, 710 F. Supp. 180 (S.D. Miss. 1989) holding that § 11-37-101 Miss. Code, violated the due process clause. The specific infirmity identified by the court was that

once a plaintiff presented the statutory form, under Miss. Code Ann. § 11-37-3, the judge had no discretion to deny the writ.

On August 10, 1989, the district court entered a second, unpublished memorandum opinion. The court found that Cole and Robbins were entitled to qualified immunity for any damage that may have occurred prior to the declaration of unconstitutionality of the statute. The court held that the qualified immunity did not apply to any acts done following the declaration of the statute's unconstitutionality and a trial was had on the sole issue of damages which would have accrued after that date. Wyatt conceded at trial that he had no provable damages after that date. Wyatt's only claim of damages consisted of deterioration of the cattle as a result of the seizure, and mental distress resulting from having had his property seized.

Petitioner appealed to the Fifth Circuit Court of Appeals which affirmed the district court's findings and also held that the private defendants would not be liable for Wyatt's attorney's fees. *Wyatt v. Cole*, 928 F.2d 718 (5th Cir. 1991).

SUMMARY OF THE ARGUMENT

Private parties who reasonably rely on state statutes or the conduct of state officials should be entitled to a qualified immunity when the statute or the conduct is subsequently declared unconstitutional. Qualified immunity for private parties based on a reasonable reliance is

grounded in compelling public policy. The *Harlow* objective standard can be used to determine when to apply the qualified immunity in the private context. The lower courts in our case properly applied qualified immunity to Cole and Robbins, and correctly determined that their reliance on the Mississippi replevin statute was reasonable.

ARGUMENT

I. QUALIFIED IMMUNITY FOR PRIVATE PERSONS FOUND TO BE JOINT PARTICIPANTS IN STATE ACTION IS THE *NECESSARY* RESPONSE TO THE POST-*LUGAR* EXPANSION OF LIABILITY FOR SECTION 1983 VIOLATIONS.[1]

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982), announced a two-pronged test which reformulated the joint participant/state action doctrine.[2] This reformulation places all post *Lugar* Section 1983 private defendants in the same category, whether their acts of constitutional violation, were in good or bad faith. Since *Lugar*, some public officer defendants who were actually responsible

[1] *See* 42 U.S.C. § 1983. For an excellent analysis of application of qualified immunity to private defendants, see *Note, Private Party Immunities to Section 1983 Suits*, 57 U. Chi. L. Rev. 1323.

[2] The first prong of the *Lugar* test addressed the "state act" triggered by the private defendant which would include all violations of constitutional rights by the state regardless of the public officer's motivations. Then by simply requiring that the private individual need only act together with or obtain "significant aid" from public officials, the second prong lowered the actionable threshold by removing the conspiracy requirement of previous decisions.

for the execution of a violation may escape liability by claiming official immunity while the private defendant is made to pay for placing faith in state law or the conduct of governmental officials. See *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989) (private contractor following Navy guidelines to prepare land survey held liable while Navy defendants were afforded qualified immunity).

The *Lugar* Court was aware of the potential anomaly when it announced the expansion of Section 1983 liability into conduct traditionally considered private. Justice Powell cautioned "that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions." *Lugar*, 457 U.S. at 499 n. 23.

However, the *Lugar* Court reasoned that changing the "character of the cause of action" was not the solution to this particular predicament. *Id.* Rather, the Court suggested that this problem might best be resolved through the extension of a "good faith" defense or a qualified immunity. *Id.* The Court did not "reach the availability of such a defense at this juncture." *Id.*

Our case presents this Court with the opportunity to make that decision. Logic demands the extension of some form of protection to private individuals acting with reasonable reliance on presumably valid statues or placing faith in a public official's conduct. To impose liability upon this category of private party and then to deny them the same qualified immunity offered state officials, is neither logical nor just.

On occasion, this Court has justified the application of immunity to public officials by looking to the common law existing at the time of the passage of the Civil Rights Act of 1871, in addition to considering present public policy. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981). Wyatt relies heavily on such historical analysis, and some circuits have similarly overemphasized the requirement of historical justification while down playing policy inquiries.[3]

Those circuits which have recognized such immunity have perhaps strained to incorporate the good faith defenses at common law in 1871 to today's circumstances simply to meet the "historical inquiry requirement." In the context of post-*Lugar* private defendants the historical analysis should be eliminated.

A. The historical inquiry into private party immunity of 1871 is of little value in addressing issues of private party immunity in today's context.

A problem with the historical inquiry, heavily relied upon by Wyatt in our case, is this Court's non-uniform

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[3] The First Circuit rejected an analogy to the good faith defense of malicious prosecution found at common law. *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978). The Sixth Circuit rejected qualified immunity for private individuals but recognized a good faith defense as distinguished from an immunity, in *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988). The Ninth Circuit initially stated that "there is no good faith immunity under Section 1983 for private parties," but in a later opinion, appeared to retreat from the position. *Compare Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983) with *Thorne v. City of El Segundo*, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986).

use of that inquiry to Section 1983 liability and immunities. The Court expanded Section 1983 liability far beyond that envisioned by its authors without any historical analysis, on the one hand, while limiting the justification of immunity to a historical inquiry into common law of 1871, on the other hand.

Since public officials enjoyed certain immunities at common law, this inconsistency has had little bearing on the Court's analytical means used to justify the end of granting immunities to governmental officials. However, private parties of that period were not similarly situated with public officials. Therefore, a different analysis is required.

1. At common law in 1871 private parties had no need of immunity.

No cause of action against a private actor for the deprivation of a constitutional right existed at common law; hence, no immunity was needed. Therefore, to rely on an inquiry into the common law of 1871 to gain insight into situations where immunity should be applied today is ineffectual, given that private parties were not considered state actors for another century. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (this Court's first recognition of the joint participation doctrine).

Additionally, this Court should take into consideration the evolution of its analysis used to support varying degrees of immunity for individual conduct of a public official. As the Court expanded the circle of potential defendants, it has de-emphasized and, indeed practically,

eliminated its reliance on the historical foundations of immunity. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

2. The Supreme Court has eliminated the individual historical inquiry in more recent cases.

Justice Scalia wrote in *Anderson*, "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Id.* at 645. Moreover, Justice Scalia stated that "such a notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles *not at all embodied in the common law*". *Id.* (emphasis added). According to Justice Scalia, the general principle of qualified immunity that *Harlow* established would be applied "across the board." *Id.* (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 815-820 (1982)).

If this Court needs a historical foundation for the granting of qualified immunity to those private persons converted to state actors, it can adapt the common law analysis made by most circuits which have found granting private party immunities appropriate.

3. The common law good-faith defense to malicious prosecution and wrongful attachment claims can be fairly analogized to qualified immunity in the private party context.

At common law in 1871 a person was not liable under the tort of malicious prosecution, wrongful attachment,

or abuse of process unless he commenced the attachment with malice and without probable cause. *See generally* W. Prosser, *Handbook of the Law of Torts*, § 120 (4th ed. 1971). In making these analogies several circuits acknowledged that these defenses were not technically immunities. *Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1440-1443 (11th Cir. 1987) *aff'd on rehearing*, 851 F.2d 1321 (11th Cir. 1988); *Folsom Inv. Co., Inc. v. Moore*, 681 F.2d 1032, 1037-38 (5th Cir. 1982). However, as this Court stated in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

With this perspective, this Court in *Pierson v. Ray*, 386 U.S. 547 (1967), granted police officers immunity under Section 1983 when they arrested someone under a presumably valid statute which they relied upon in good faith, but which was later declared unconstitutional. The rationale was that common law immunity was granted to police officers whose arrests were false or resulted in false imprisonment but were made in good faith and with probable cause. *See also Wood v. Strickland*, 420 U.S. 308, 318-19 (1975) (public school officials liable under state tort law for malicious acts established good faith immunity under Section 1983).

The Fifth, Eighth, and Eleventh Circuits simply followed this Court's reasoning when they found that the availability of similar defenses in actions for malicious prosecution and wrongful attachments supported the historical precedent for recognizing qualified immunity in the private context. *See Folsom* 681 F.2d at 1037-38 (common law defense of malicious prosecution grounded in

same type of public policy – citizen should not be penalized for resorting to courts in good faith); *Buller v. Buechler*, 706 F.2d 844, 850-853 (8th Cir. 1983) (adopted *Folsom* analysis); *Jones* 808 F.2d at 1440-1443 (maintained that Supreme Court use of good faith defense at common law to justify immunity in *Wood v. Strickland* transferred to private context); *see also DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988) (court did not address common law analysis but cited above mentioned decisions).[4]

Whether the historical analysis is made by way of analogy to the malicious prosecution good faith defense at common law (in spite of its shortcomings), or not made at all, the policy inquiry approach is more instructive in determining the entitlement of qualified immunity in today's circumstances and does not run afoul of this Court's extension of immunity to public officials.

B. Compelling public policies call for the grant of qualified immunity to post-*Lugar* private defendants.

Powerful policy considerations support the granting of qualified immunity to private individuals such as Cole and Robbins. The Eleventh Circuit best described these policies in the following:

> When a citizen undertakes in good faith to utilize a proceeding at law provided by his state legislature, he should do so with confidence that

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[4] *See infra* note 3 for discussion on opposing circuits.

> he need not fear liability resulting from the legislatures's constitutional error of which he was unaware. Indeed, our system encourages citizens to employ existing lawful mechanisms to resolve their claims and disputes. *What we encourage we ought not seek to punish.* In the same way we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert their claims right through the employment of legal mechanisms which they believe, in good faith, are constitutional.

Jones, 851 F.2d at 1325 (emphasis added) (this case addressed the issue of immunity with respect to presumptively valid attachment statutes which is sufficiently applicable to our case involving a presumptively valid replevin statute).

Although the objectives of the policies underlying the grant of qualified immunity to government officials are not identical to the objectives stated in the policies discussed above, they are analogous, in that they do take aim at a similar target.

1. Public policies supporting private party qualified immunity are analogous to those policies underlying qualified immunity for government officials.

The average citizen should be able to rely on presumptively valid state statutes or authorities to vindicate his or her rights or fulfill his or her obligations just as the public officers need to be able to conduct their duties without the threat of interfering liability. For example, the

Ninth Circuit denied qualified immunity to landlord defendant in *Howerton v. Gabica*, where a police officer accompanied the landlord when serving valid eviction notices. 708 F.2d 380. Presumably, the landlords had a legal right to call the police officers to their aid in the eviction procedure. *Id.*

In *F.E. Trotter, Inc. v. Watkins*, immunity was refused to a private contractor who was sued for actions he took which were necessary to fulfill a land survey contract with the Navy. 869 F.2d 1312. In other words, the private contractor was under a *legal obligation* to act in a way that resulted in a constitutional violation for which he was held liable. He potentially faced a breach of contract claim if he failed to comply. *Id.*; *compare DeVargas*, 844 F.2d at 721, 722 (court found immunity necessary where governmental authority involved required private defendants to act as they did or likely be liable for breach of contract).

Without the protection of qualified immunity, private parties may be encouraged to resort to less desirable methods of self help. *Jones*, 851 F.2d at 1325. In *Lugar*, the Court suggested that private parties have a right "to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 451 U.S. at 937.

The state and not the private parties, should be liable for unconstitutional laws or unconstitutional official conduct, upon which the private person relies in good faith. Wyatt seeks here to recover from Cole and Robbins for what he cannot recover from the Mississippi legislature nor its attorney general.

To hold private citizens who act with reasonable reliance accountable while shielding the legislative and executive branches of government is to engender disrespect for the law. As the Fifth Circuit aptly stated in *Folsom*, to subject a private party "to constitutional tort damages for invoking in good faith presumptively valid legislation later held to be unconstitutional would be to visit the effects of unconstitutional action by the legislature on innocent citizens." 681 F.2d at 1037. The Eleventh Circuit statement bears repeating: "[w]hat we encourage we ought not seek to punish." *Jones*, 851 F.2d at 1325.

This Court has protected the government from liability for private conduct that it did not initiate and as noted in *Lugar*, the Court "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. To fail to accord private persons with similar protection would not only ignore logic but undermine the private person's faith in the legal system.

These policy considerations provide this Court with a logical and fair basis for recognizing qualified immunity in the private context. Additionally, the end results of these means will not disturb the Court's previous holdings.

2. Policy considerations for granting private party qualified immunity are consistent with this Court's reformulation of public official immunity.

In *Dennis v. Sparks*, 449 U.S. 24 (1980), this Court denied private party immunity to those "private persons

who corruptly conspired with the judge". Nevertheless, entitling private defendants to qualified immunity who act with reasonable reliance will not disturb the *Dennis* holding. Private actors guilty of bad faith such as "conspiring with a judge" to deprive a party of his rights will not be entitled to immunity under the standards discussed in Section II.[5]

However, even though the holding in *Dennis* can be maintained, the Court relied on a historical analysis that, of course, revealed nothing at common law that would afford private persons immunity who corruptly conspired with judges. On the facts of *Dennis*, the end result may have been justified, but the means by which it was reached offer little to post-*Lugar* private defendants who do not "corruptly conspire" but act in good faith reliance.

Assuming that private actors who act with reasonable reliance are entitled to qualified immunity, the next issue is the standard to be applied.

II. THE OBJECTIVE STANDARD FORMULATED IN *HARLOW v. FITZGERALD* EFFECTIVELY TRANSLATES INTO THE PRIVATE PARTY IMMUNITY APPLICATION.

In *Harlow v. Fitzgerald*, this Court adopted a purely objective test by which to judge whether a governmental official is entitled to qualified immunity. 457 U.S. 800

[5] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), would also be undisturbed since that case involved a conspiracy element.

(1982). The defense of qualified immunity shields a state official from liability in a Section 1983 action when the officials' "conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have then known." *Harlow*, 457 U.S. at 818. The test is a two part inquiry: (1) whether the rights which were violated were clearly established; and (2) whether the reasonable person would have known of the violation.

As this Court maintained in *Harlow*, "reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law . . . [would] permit the resolution of many . . . claims on summary judgment." *Id*. Therefore, a trial court may answer the two inquiries as a matter of law at the summary judgment level.

The *Harlow* test transfers smoothly to the private defendant context. The actions of the private defendant who relies on state statutes or who places faith in the conduct of governmental officials can be judged by the same objective standard set out in *Harlow*.

The Sixth Circuit is too narrow in its analysis in *Duncan v. Peck*, where the Court views the use of the *Harlow* test by those circuits granting immunity in the private context as distorted. That court perceived the use of a subjective element in those cases because of those circuits' comparisons to the common law actions of malicious prosecution. *Duncan*, 844 F.2d at 1267.

The cause of malicious prosecution required a determination of the defendant's state of mind since intent or

conspiracy was generally involved. However, as discussed earlier, those circuits using the comparison to this common law action did so by analogy and not by mirror image adoption. The rationale of the good faith defense at common law gives rise to the rationale in support of good faith qualified immunity. The standard by which either is judged does not affect the purpose of the existence of the defense or the immunity.

Furthermore, that some circumstances may require more intensive fact examination does not mean that an objective test cannot be applied. In *Anderson*, this Court reasoned that a court must look at a qualified immunity claim in the context of the particular facts of the case. *Anderson*, 483 U.S. at 641. The Court concluded that "[t]he relevant question of [the] case . . . is the objective (albeit fact-specific) question of whether a reasonable officer could have believed [the] warrantless search to be lawful. . . . " *Id*.

Likewise, when examining the private conduct the courts must look to the facts of the case. The record may include evidence that the defendants actually knew of the constitutional problem. However, as the district court stated in this case, whether the infirmity of the statute was obvious, meaning that Cole and Robbins knew of its infirmity, was not a material fact. J.A. 13. The determination was whether a reasonable person under the same circumstances could have determined the infirmity.

Some private defendants should be held to a higher standard of knowledge. Utilizing the objective standard set out in *Harlow*, not unlike establishing standards of care in negligence cases, courts can make determinations

on a case by case basis regarding the extent to which the private defendant should have knowledge of the law.[6]

One of the reasons this Court eliminated the subjective element from the test used prior to *Harlow* was to encourage the resolution of insubstantial claims at the summary judgment level which would avoid undue disruption of governmental activities. *Id.* In the private context this rationale still holds true. However, rather than preventing the disruption of government, the analogy in the private context is that judicial economy is promoted, notwithstanding the other important public policies already stated.

A. The objective nature of the *Harlow* test affords private defendants the same procedural benefits as public officers, thereby promoting judicial economy.

Applying qualified immunity in the private context judged by the objective standard in *Harlow*, would allow courts to limit discovery since the particular private defendant's subjective state of mind – whether he actually knew that his conduct violated a clearly established constitutional right – is not a material fact in all but

[6] For example, an officer of the state may be held to a higher degree of knowledge of law than that of a private person; or a business that consults regularly with an attorney may have a higher standard than the business that has little or no legal advice. Even an attorney, such as Robbins, may be held to the higher standard as compared to the layperson. The objective nature of the test allows the courts to deal with these situations individually.

exceptional cases. Similarly, summary judgment decisions on the immunity issues are facilitated, as well as early disposal of frivolous lawsuits. Also, immediate appeal is available to the private defendant. Disposal of litigation at these early stages not only conserves the time and energies of the judicial system but also aids in limiting the legal expense for the private party who does not have at his disposal the resources of the attorney general's office.

Finally, this Court reasoned that "the public interest in deterrence of unlawful conduct and in compensation of victims remain[ed] protected by a test that focuses on the objective legal reasonableness of an official's acts", *Harlow*, 457 U.S. at 819. This is because the conduct of public officials that falls outside the reasonable standard would fail the objective test, and liability would attach. *Id.* Providing qualified immunity to private actors as judged by the objective standard also promotes the dual purposes of Section 1983 for the same reasons.

B. The deterrence and compensation goals of Section 1983 are achieved with the application of qualified immunity in the private party context since bad faith violations will not escape liability under the objective test.

Lugar, in effect, transformed a prima facie pleading requirement of "bad faith" into an affirmative defense of "good faith." After *Lugar*, both good faith and bad faith conduct are lumped together. Utilizing the objective standard with private defendants to implement qualified

immunity creates a mechanism for sorting these two categories by providing the innocent defendant with protection.

In the private context, the necessary balancing between the need to defer constitutional deprivations and to compensate victims when that deterrence fails is preserved for the same reasons stated in *Harlow*. Liability will attach for corrupt or conspiratorial conduct,[7] e.g. "bad faith," since such conduct would fail the objective test – where private persons reasonably should have known that their reliance on state statutes or authorities would violate clearly established law.[8]

As the Eleventh Circuit reasoned, "no additional deterrence can be achieved by punishing individuals who could not reasonably have known that their actions were improper." *Jones*, 851 F.2d at 1325. In light of this Court's comparable reasoning in *Harlow*, the objectives of Section 1983, deterrence and compensation, are met with the application of qualified immunity in the private party context.

[7] *See supra* note 5 and corresponding discussion in text.

[8] The objective standard would effectively deal with concerns as expressed by the First Circuit when the court implied that granting immunity to private persons, especially those acting to maximize profit or to gain personally would encourage the deprivation of constitutional rights. *See Lovell v. One Bancorp*, 878 F.2d 10 (1st Cir. 1989). In situations like those, actors would escape liability only if they could show that a reasonable person could not have acted otherwise.

III. THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED QUALIFIED IMMUNITY TO THE PRIVATE PARTIES IN OUR CASE.

A proper application of qualified immunity in this case requires that its grant be grounded on compelling public policy. Furthermore, the court must judge the private defendant's actions under the "reasonable person" objective standard to determine the entitlement to qualified immunity.

In evaluating the actions of Cole and Robbins, the district court denied the plaintiff's motion for summary judgment on the issue of liability for damages resulting from defendants actions prior to the statute being held unconstitutional. The court held that Cole and Robbins as private defendants were entitled to a good faith or qualified immunity based on the holding of the Fifth Circuit in *Folsom*, as well as the district court's reliance on the *Harlow* decision Furthermore, the court applied the *Harlow* test to the Defendants' conduct. The Fifth Circuit's affirmation was proper because:

A. The lower courts made the appropriate historical and policy inquiries to establish support for their application of qualified immunity in this case.

The district court relied on the rationale used by the Fifth Circuit in *Folsom* to support its grant of qualified immunity. *Folsom* involved a Section 1983 action for monetary damages for alleged wrongful and unconstitutional attachment of 200 acres of real estate which is

similar enough to the Mississippi replevin statute to be applicable. *Folsom*, 681 F.2d 1032. In that case the Fifth Circuit based its conclusion to grant immunity upon a thorough policy and historical analysis. In *Wyatt v. Cole*, 928 F.2d 718 (5th Cir. 1991)(*per curiam*), the Fifth Circuit incorporated its inquiries made in *Folsom*.

The court's policy considerations for granting immunity to Cole and Robbins are as follows:

> [T]he private party is entitled to an immunity because of the important public interest in permitting ordinary citizens to rely on presumptively valid state laws, in shielding citizens from monetary damages when they reasonably resort to a legal process later held to be unconstitutional, and in protecting a private citizen from liability when his role in any unconstitutional action is marginal.

Folsom, 681 F. at 1037. As summarily stated in *Wyatt*, the court held that citizens acting in good faith should be allowed the sanctuary of the law. 928 F.2d at 821.

The Fifth Circuit also addressed the historical approach to immunities at common law. The court did not regard the lack of common law immunity as a barrier to the creation of qualified immunity in the private party context. *Folsom*, 681 F.2d at 1037 (making reference to *Owen v. City of Independence*, 445 U.S. 622 (1980).[9] In other words, the Fifth Circuit reasoned that "compelling public

[9] In *Owen* this Court held that since there was not history of immunity for municipal corporations extant at the time of § 1983's passage and since there is no public policy support today for such an immunity, none would be implied.

policies [were sufficient justifications] for an immunity in protecting a private citizen who in good faith invokes a presumptively valid state attachment statute." *Id.* at 1038. Moreover, "such a citizen, although not immunized per se, would not have been subject to tort liability prior to the passage of Section 1983." *Id.*

Nonetheless, the court analogized the pre – Section 1983 action of malicious prosecution and its defense based upon probable cause to today's application of qualified immunity to the private defendant. The court noted that this "defense was not the same as an immunity, but was grounded in many of the same types of public policy justification supporting [an immunity in the private context]." *Id.* at 1038. The court further reasoned that "the existence of a probable cause defense at common law convinces us that Congress in enacting § 1983 could not have intended to subject to liability those who in good faith resorted to legal process." *Id.* A common law defense extant at the time of § 1983's passage has been transformed into an immunity." *Id.*

The Fifth Circuit followed the analytical pattern which evolved through the Supreme Court's application of immunities in the public official context and through the application of immunity in the private context in other circuits. Given the careful attentions that the Fifth Circuit gave to both policy and the historical inquiries in its analysis, this Court should follow the Fifth Circuit's reasoning under it own independent review.[10]

[10] Because this appeal reaches this Court from summary judgment below, as an appellate court this Court must apply

(Continued on following page)

B. The lower courts applied the *Harlow* objective test to the facts of our case and properly held that Cole and Robbins' reliance on the validity of the Mississippi replevin statute was reasonable.

Here, the district court followed the Fifth Circuit's lead in *Folsom*. The court maintained that the federal test for qualified immunity as set forth in *Harlow* is identical for both private individuals and for state officials performing discretionary functions. *Folsom*, 681 F.2d at 1032.

In determining the reasonableness of Cole and Robbins' actions, the lower courts considered the history of the Mississippi replevin statute, Miss. Code Ann. § 11-37-101; its predecessor statutes, and evidence regarding the actual conduct of Cole and Robbins. J.A. 13. The district court, as did the Fifth Circuit under its de novo review, decided that given the fluctuation of the law, Cole and Robbins' reliance on the statute was inherently reasonable and sincere.

There was no reported decision, either state or federal, that held the Mississippi statutory procedure used

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the same substantive test and rules for the propriety of summary judgment as did the district court in ruling on the motion and the court of appeals in affirming such. That is, this Court "must determine whether the record as it stands reveals any disputed issue of material fact, assume the resolution of any such issue in favor to the non-movant, and determine whether the movant is then entitled to judgment as a matter of law." Fed. R. Civ. P. 5; *First Jersey Nat. Bank v. Dome Petroleum Ltd.*, 723 F.2d 335, 338 (3rd Cir. 1983). As a question of law, the standard of review is de novo.

by Cole and Robbins to be unconstitutional. Prior to this time, the Supreme Court of the United States had addressed the constitutionality of a number of state property recovery statutes addressed in the discussion below. However, in view of the state of flux of the law, it cannot be said that the use of the Mississippi replevin statute violated a *clearly* established constitutional right of Wyatt.

In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the plaintiff attacked the constitutionality of Louisiana's sequestration statutes based on the statutes' failure to provide a pre-seizure hearing. Mitchell relied upon the long line of cases of this Court, culminating in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972). *Mitchell*, 416 U.S. 600. This Court noted that the holdings in those cases were not as clear as petitioner would have it. The Court found the Louisiana statute constitutional because it provided for "an immediate hearing and dissolution of the writ unless the plaintiff could prove the grounds upon which the writ was issued." *Id.* at 618.

The Louisiana sequestration statutes, by no means stand in stark contrast to the Mississippi replevin statute utilized by Cole and Robbins. The Louisiana statutes required that the clerk issue the writ upon presentation of an affidavit stating the nature of the claim and the amount and the grounds relied upon by the plaintiff. The defendant could dissolve the writ by contradictory motion, or could obtain release of the property by posting security for it. La. Code Civ. Proc. Ann. Art. 3501, 3506. This Court found significance in the fact that Louisiana law provided for an immediate hearing and dissolution of the writ.

In similar fashion, the Mississippi replevin statute, as it existed in 1987, provided for issuance of the writ by a judge (as opposed to a clerk) upon execution of a statutory affidavit by the plaintiff. The statute required specific allegations including: 1) a description of the property; 2) the facts and circumstances upon which the plaintiff relies for his claim including the attachment of any documents supporting the claim of wrongful possession; and 3) the attachment of any supporting documents. 1975 Miss. Laws Ch. 508.

In addition, the statute called for the posting of a bond by the plaintiff. As a procedural safeguard, the defendant could post a bond within two days from seizure of the property and the property would be restored to him pending final judgment. The law provided that all replevin actions were to be treated as "preference cases" to reach "an early determination as to the rights of the parties. . . ." 1975 Miss. Laws Ch. 508, § 23. The pre-1975 version of the statute had provided for issuance by the clerk of the court and made no provisions for expedited hearings. Miss. Code Ann. § 11-37-1 *et seq.* (1972).

As the district court stated in its initial opinion, although the Supreme Court had declared unconstitutional statutes which allowed seizures which were ordered by a court clerk without a hearing, they did not "prevent prejudgment seizures in every instance." J.A. 6. The court further noted in its findings that the Mississippi statute was similar to the Louisiana statute upheld in *Mitchell*. J.A. 6-7.

The 1975 version of the Mississippi replevin statutes had been enacted following this court's decisions in

Sniadach, *Fuentes* and *Mitchell*. This fact, coupled with the other extenuating circumstances surrounding the Mississippi statute, supported the courts' holdings that Cole and Robbins' reliance upon the statute was reasonable.

Furthermore, in this case the Fifth Circuit went on to reason that although the statutory scheme [§ 11-37-101] was in legal jeopardy, "Cole and Robbins acted with the assistance of government officials who were giving full force and effect to the statutory procedure." *Wyatt* 928 F.2d at 821 The Court's position was that the presence of these officials in this context of the use of the statute "contributed to the reasonableness of the private actors' conformity to statutory procedure." *Id.*

In the end the Fifth Circuit's holding of reasonableness in these circumstances rested on the premise of political accountability. It is the government who should bear the responsibility for its laws in cases like ours. As the Fifth Circuit described:

> The first line of responsibility rests with the legislative body enacting the statute. The next line of responsibility rests with the enforcing officials. When the legislature has not repealed, and executive and judicial officials are still enforcing a statute, it is not unreasonable for private actors to fail to quickly comprehend a developing body of doctrine that portends trouble for its constitutionality.

Id.

Having addressed both policy and historical considerations adequately, the analysis of the lower courts in our case was complete. Both courts' determination of the

reasonableness of the defendants' conduct under the circumstances of our case as judged by the *Harlow* standard was accurate. If this Court adopts the doctrine of qualified immunity for post-*Lugar* private defendants, as it should, then the decisions of the lower courts in our case should stand as ordered.

CONCLUSION

The district court's grant of partial summary judgment to defendants Cole and Robbins on the issue of entitlement to qualified immunity against any damages that occurred prior to declaration of the unconstitutionality of Miss. Code Ann. § 11-37-101 and the Fifth Circuit Court of Appeals' affirmation of this holding was proper and should be affirmed by this Court.

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No. 91-126

In The
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October Term, 1991

HOWARD WYATT,
Petitioner,

vs.

BILL COLE and JOHN ROBBINS, II,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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Respondents attempt to justify qualified immunity for private parties by claiming that there are reasons analogous to those supporting government official immunity that also support private party immunity, but they fail to present any of these allegedly parallel justifications. *See* Respondents' Brief ("Res. Br.") at 11-14. Nor do respondents address any of the reasons that petitioner set forth in his opening brief explaining why the rationales traditionally offered for immunity for government officials do not apply here. Instead, respondents offer only one justification for exempting private parties from liability under section 1983, and even that justification is not supported by the facts of this case.[1]

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[1] Most of respondents' brief has nothing to do with the issue on which review was granted, whether private parties are entitled to qualified immunity under section 1983. Respondents' discussion of *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (cont'd)

Respondents simply state that a failure to provide an immunity will "engender disrespect for the law." Res. Br. at 14. According to respondents, without qualified immunity, citizens would be discouraged from using the law, and they should be able to take comfort in using the law to preserve their rights, including their rights to protect their property. Res. Br. at 12. Respondents portray this case as one involving a party who unknowingly uses a law that is later invalidated and urge that to fail to grant them immunity here "would not only ignore logic but undermine the private person's faith in the legal system." Res. Br. at 14.

Respondents' approach suffers from two insurmountable flaws. First, respondents do not refute petitioner's position that a functional approach to immunities, coupled with the differences between the functions of a government official and a private party, precludes any immunity for private parties. Nowhere do respondents attempt to reconcile the vastly different roles played by these two categories of potential section 1983 defendants, nor do they explain why the concerns identified in every section 1983 immunity opinion from this Court have nothing to do with immunity for private parties. Indeed, as our opening brief argued, the lack of a common law analogue, the purposes of section 1983, and the policy reasons supporting the doctrine of immunity all point to one inescapable conclusion: private parties who initiate state action for personal gain are not entitled to qualified immunity.

Second, respondents' "innocent party" argument has nothing to do with this case. Unlike the private parties who do no more than act at the state's behest, respondents initiated the unconstitutional state action for their personal gain.[2] Moreover, respon-

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(1982), and subsequent cases, relates to the standard of liability under section 1983, not the issue of immunity. Similarly, pages 21-28 of respondents' brief argues that respondents met the test for qualified immunity, an issue that petitioner has chosen not to raise in this Court.

[2] *Compare e.g., DeVargas v. Mason & Hanger-Silas Mason Co, Inc.*, 844 F.2d 714, 721 (10th Cir. 1988) (immunity granted to private parties who thought contract with the government required them to engage in conduct which then resulted in (cont'd)

dents did not simply file a lawsuit, but they sought an extraordinary writ for immediate relief without affording the minimal due process elements of notice and the opportunity to be heard, *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and in doing so violated petitioner's constitutional rights. It is with *this* factual background that the question presented comes before the Court, and it is *these* facts that compel the conclusion that the balance of policy considerations weighs decisively against a grant of immunity for respondents.

Finally, under respondents' analysis of this case, the winner of a lawsuit righting constitutional wrongs is not entitled to compensation for damages caused by private parties who acted for personal gain. They take this position despite the fact that section 1983 was intended to encourage those who have been deprived of constitutional rights to seek a remedy. Because there are no policy reasons of the kind applicable to state officials that apply here, and because all of the relevant policy considerations militate against a grant of immunity, the Fifth Circuit erred in granting respondents qualified immunity.

CONCLUSION

For the reasons presented in petitioner's brief and above, the judgment should be reversed and remanded for a determination of petitioner's damages proximately caused by respondents' initiation of the unconstitutional replevin procedure.

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constitutional harm), *with Howerton v. Gabica*, 708 F.2d 380, 384-85 (9th Cir. 1983) (private party who sought police action through extraordinary measures for private gain not entitled to immunity); *but see F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989) (contractor denied qualified immunity in blanket, unreasoned application of circuit precedent, even though private party acted at state's behest); *Jones v. Preuit & Mauldin*, 851 F.2d 1321, 1324-25 (11th Cir. 1988) (*en banc*) (where majority, like respondents here, rejected policy reasons set forth in dissents).

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